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THE PROPERTY OF
THE LAW SOCIETY

DIGEST OF REPORTS

OF

CASES DECIDED IN THE COURT OF CHANCERY, IN THE
COURT OF ERROR AND APPEAL, ON APPEAL
FROM THE COURT OF CHANCERY, IN
CHANCERY CHAMBERS, AND IN
THE MASTER'S OFFICE.

INCLUDING ALL CASES REPORTED IN VOLUMES 14, 15, 16, 17 AND 18 OF
GRANT'S REPORTS; AND 2, 3 AND 4 CHANCERY CHAMBERS
REPORTS; AND, WITH THE FORMER DIGEST, ALL
CASES UP TO 1ST JULY, 1872.

BEING A SUPPLEMENT TO "COOPER'S EQUITY DIGEST" (1868)

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BY
C. W. COOPER, Esq.,

BARRISTER, LATE REPORTER IN CHANCERY CHAMBERS.

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Entered according to Act of the Parliament of Canada, in the year One Thousand Eight
Hundred and Seventy-three, by C. W. Cooper, Esq., in the Office of the Minister of
Agriculture.

JUN 18 1962

C. W. COOPER, ESQ.

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NOTE.

THIS volume contains all cases reported in Volumes 14, 15, 16, 17 and 18, Grant's, and 2, 3 and 4, Chancery Chamber Reports. It includes the cases given in the Appendix to the former Digest, and if bound together, the Appendix should be left out. Occasionally a reference will be found to earlier cases than those in the above Reports—this is occasioned by including the Appendix of the former Digest. There will be found throughout this volume certain headings which strictly ought to be classed under the head of Practice, but if all Practice points had been classed under that head, it would have occupied an undue space; they have, therefore, been distributed under headings which are, in fact, but sub-headings. The reference in some instances to cases in Vol. 4, Cham. Reports, does not give the page, that volume not having been complete in print when the references were made. For decisions overruled, omitted cases, &c., see Addenda.

NOTE

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OF

CASES IN CHANCERY,

TO 1ST JULY, 1872.

ABATEMENT.

Of Suit.

A suit does not abate by the death of one of the plaintiffs, if others remain on the record having similar interests, and capable of maintaining the suit. *Alchin v. Buffalo Railway Company*, 2 Cham. R., 45.

Where a plaintiff had assigned, in part, his interest in the subject matter of the suit, an objection that the suit had abated was overruled. *McDonell v. U. C. Mining Co.*, 2 Cham. R., 400.

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See SERVICE—PRACTICE—SECURITY FOR COSTS.

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ABSTRACT OF TITLE.

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See CONTRIBUTION.

ACCOUNT.

See PARTITION—EXECUTORS.

Ordinarily, a bill for an account will not lie by an agent against a principal. *James v. Snarr*, 15 Grant, 229.

A bill for an account was held to lie at the suit of a municipal corporation against their treasurer and his sureties. *The Municipal Corporation of the Township of East Zorra v. Douglas*, 17 Grant, 462.

ACCOUNTANT.

His Jurisdiction, Duties, and Powers.

See 34 VICT., c. 10.

ACQUIESCENCE.

See NUISANCE—EASEMENT—PLEADING—ASSIGNMENT FOR
BENEFIT OF CREDITORS.

ACTS.

ACT 29 & 30 VICT.

See SECURITY FOR COSTS.

ACT 29 VICT., CH. 28—*Construction of.*

Section 28—See INSOLVENCY.

Section 31—An administrator was desirous of converting saw logs into lumber, for the benefit of the estate he represented. An application under above Act, Section 31, was entertained, and an opinion given in favour of the course suggested. *Re Cardwell Estate*, 2 Cham. R., 150.

Section 33—See ADMINISTRATOR, &c., VI.

ACT 25 VICT., CH. 72.

*Execution of Conveyances under, by Plaintiff—Commissioners—
Powers of Attorney.*

A purchaser of lands in Canada, from the Trust and Loan Company, cannot insist upon a conveyance under the corporate seal of the Company; for, it being an English Company, it would be highly inconvenient if all conveyances had to be sent to England for execution; and the Statute 25 Vic., ch. 72, effectually provides against the doubts and difficulties in a title, to which the execution of conveyance, under powers of attorney, ordinarily give rise.

But the Company is bound to place the purchaser in the same position, as nearly as may be, as if the conveyance were directly by the Company; and, therefore, it should provide and annex to the conveyance executed by the Commissioners referred to in the above Act a certified copy of the commission or power of attorney authorizing them to Act for the Company.

An execution by one of two or more Commissioners, whose appointment is authenticated as provided by the above Act, is not a compliance with its provisions, and a purchaser is not bound to accept a conveyance so executed. *Trust and Loan Co. v. Monk*, 14 Grant, 885.

ACTS AFFECTING THE COURT OF CHANCERY, AND THE PRACTICE THEREOF, PASSED SINCE THE PUBLICATION OF DIGEST (1868).

34 Vict., Cap. 10—*Ontario—Act respecting the Court of Chancery.*

ADMINISTRATION—ADMINISTRATION SUITS—
ADMINISTRATOR.

See ASSIGNMENT, 4—BUILDING SOCIETY, 2—EXECUTORS—
JUDGMENT CREDITOR—WILL—LUNACY AND LUNATICS—
PETITION.

I. RIGHTS AND LIABILITIES OF EXECUTORS AND ADMINISTRATORS.

II. COMPENSATION TO.

III. RIGHTS OF CREDITORS AS AGAINST.

IV. LETTERS OF ADMINISTRATION.

V. FOREIGN ADMINISTRATION.

VI. MISCELLANEOUS.

I. RIGHTS AND LIABILITIES OF EXECUTORS AND ADMINISTRATORS AS TO COSTS AND OTHERWISE.

Executors in this Province have no right to leave the administration of the estate to this Court without some special necessity, where the expense of the suit would be disproportionate to the amount of costs. *McGill v. Courtice*, 17 Grant, 271.

In such a case, where the only important difficulties in the administration of an estate were created by a large claim of the executors, which they failed to make good, and a claim of their father's, which he had made at their persuasion, and against his own wish ; and the executors had more money in their hands than was required to pay all other claims against the estate, they were charged with the costs of an administration suit, brought by a creditor. *Ib.*

In an administration suit, the executors were charged with so much of the expenses of the reference as was incurred in the Master's office in establishing charges which they disputed. *Ib.*

Where one of the legatees was absent from the jurisdiction, and the executors had been unable to discover him ; this was held a sufficient ground for the executors coming to the Court to obtain an administration of the estate. *Dee v. Wade*, 18 Grant, 485.

An executor who obtains an order for the administration of his testator's estate, is not always entitled to the costs. *Sullivan v. Sullivan*, 16 Grant, 94.

An executor took out an administration order, for the purpose of establishing a claim which he made against the estate, and of having it paid by sale of the realty ; but he failed to prove his claim, and, on the contrary, a small balance was found against him. It appeared, also, that he had not kept proper books of account as executor. Held, that he should pay the costs of the suit. *Ib.*

Trustees and executors stand in a different position from

creditors or *cestuis que trustent* as to the right to have the estate administered in this Court ; and cannot, without experiencing some difficulty in carrying out the trusts, or administering the estate, file a bill for that purpose. *Cole v. Glover*, 16 Grant, 392.

The next friend of infants filed a bill against the mother of the infants—their guardian appointed by the Surrogate Court—and her husband, alleging certain acts of misconduct, which were not established in evidence ; and the accounts taken under the decree resulted in showing a balance of about \$22 in the hands of the defendants. The Court being of opinion that the suit had been instituted recklessly, and without proper inquiry, ordered the next friend of the plaintiffs to pay the costs of the defendants as between party and party. *Hutchinson v. Sargent*, 17 Grant, 8.

A sum of money was advanced to an agent, who was also executor, avowedly to pay taxes, for which the lands of the testator were liable, and it was shewn that a part only of the sum advanced was so applied : *Held*, that the lender was entitled to claim against the estate to the extent to which the money was shewn to have been expended thereon, and that, too, without reference to the state of account as between the executor and agent and the estate. *Ewart v. Steven*, 16 Grant, 193.

M. was administrator of the estate of *S.*, and was managing the real estate for the heirs ; he was also one of the executors and trustees of *E.* ; there was a sum of \$808.55 due for taxes on some property of the *S.* estate, and *M.* paid the same with money of the *E.* estate, directing the agent of that estate to charge the amount to the *S.* estate ; *M.* did not enter the amount in his accounts with the *S.* estate as a loan, and, on the contrary, in the accounts which he rendered he took credit for the amount as a payment by himself ; the heirs knew nothing of the loan until some time afterwards ; they had not authorized *M.* to borrow money ; and he was at the time indebted to them as agent in a sum exceeding the amount of the taxes ; *M.* afterwards died insolvent, and indebted to both

estates: *Held*, in appeal, that the *E.* estate could not hold the heirs of the *S.* estate liable for the \$808.55, and was not entitled to a lien therefor on the property in respect of which the taxes were payable. *Ewart v Steven*, 18 Grant, 35.

II. COMPENSATION TO EXECUTORS.

Where the estate to be administered was large, requiring great care, judgment, and circumspection in its management for a number of years, the Court sustained an allowance of \$1500 to the principal executor and trustee, and \$1500 to the others jointly. *Denison v. Denison*, 17 Grant, 306.

Where a legacy is given to executors, as a compensation for their trouble, they are at liberty to claim a further sum under the Statute, if the legacy is not a sufficient compensation. *Ib.*

III. RIGHTS OF CREDITORS.

A widow and children were entitled under a will, to support out of the testator's property, and goods were supplied for this purpose to the executors: *Held*, that the creditor who advanced the goods had no charge against the estate, but must proceed against the executors personally. *Campbell v. Bell*, 16 Grant, 115.

The fact that a creditor of an estate has proceeded at law after a decree for the administration of the estate of the testator has been obtained, is not sufficient to deprive him of his costs either at law or of a motion in this Court to restrain his action. *Re Langtry*, 18 Grant, 530.

In a suit by a creditor for the administration of his deceased debtor's estate, any party beneficially interested in the estate may apply to stay proceedings, on payment of the creditor's claim and costs. The right to do so is not confined to the personal representative. *Fitten v. Dawson*, 3 Cham. R., 461.

Where an order for administration had been granted to a devisee, who was also a creditor of the estate to a large amount, but did not state that fact when applying for administration,

his silence as to it was considered a ground for sustaining an order transferring the conduct of the proceedings under the reference to another party interested under the will.

No one has a special right to the conduct of proceedings in the Master's office upon a reference under an administration order, but *ceteris paribus* it will be committed to those who have the greatest interest in conducting them properly and economically. *Perrin v. Perrin*, 3 Cham. R., 452.

Under an administration decree, a creditor claimed, by virtue of a partnership with the testator. It was objected that the establishment of his claim involved taking the partnership accounts, and they could not be gone into under the decree. The Master held that the claim could be entertained, and directed that a third party to the partnership, who was a stranger to the suit, should be served with an office copy decree, and notified of the proceedings to take the partnership accounts. *Kline v. Kline*, 3 Cham. R., 137.

On an application by a creditor in an administration suit, for the sale of real estate of the testator, the executors, to whom part of the real estate was devised, were held sufficiently to represent the parties interested in the real estate, for the purposes of the motion; and the order asked for was granted, with a direction that an office copy of the decree should be served on each of the parties interested in the real estate under the will. *Stewart v. Hunter*, 14 Grant, 132.

IV. LETTERS OF ADMINISTRATION, PRODUCING.

In moving for administration order, the letters of administration should be produced. *Re Israel*, 2 Cham. R., 392.

[*Note*.—See following case.]

Where, on an application for an administration order, the fact of the defendant being administrator is not disputed, and the plaintiff has filed an affidavit that he is administrator it is not necessary to give further evidence of the fact, or to produce the letters of administration, or a copy thereof. *Re Bell*, 3 Cham. R., 397.

V. FOREIGN ADMINISTRATION.

A foreign administrator cannot effectually release a mortgage on land in this Province. Payment to him, and a release by the heirs, are not sufficient to entitle the owner to a certificate of title, free from incumbrances, under the Act for Quietting Titles.

Where a person, resident in a foreign country, dies possessed of mortgages on land, situate in the Province, the Surrogate Court, of the county within which the land lies, has jurisdiction to grant administration where the Surrogate Court of no other county has jurisdiction.

The Surrogate Courts of this Province have the same authority to grant limited administrations as the Probate Court in England has. In *Re Thorpe*, 15 Grant, 76.

Where a testator dies in a foreign country, leaving assets in this Province, the Court, at the instance of a legatee, will restrain the withdrawal of the assets from the jurisdiction, notwithstanding that there may be creditors of the testator resident where the testator was domiciled at the time of his death; and that there are no creditors resident in this Province. *Shaver v. Gray*, 18 Grant, 419.

VI. MISCELLANEOUS.

Section 33 of the Act to amend the Law of Property and Trusts, 29 Vict., ch. 28, which enacts that any person, after 31st December, 1865, dying seized of land charged with the payment of any sum of money by way of mortgage, the heir or devisee shall not be entitled to have the mortgage debt discharged out of the personal estate: *Held*, not to apply to cases where the land is charged with the performance of an obligation other than the payment of money.

In a case, such as suggested, where the Statute was held not to apply:—It was considered no bar to the chargee's right to be paid out of the personal estate of the intestate, that he was himself also heir-at-law of the intestate: *Held*, that a suit against an administrator by a person entitled to a legacy or

distributive share of the estate cannot be brought before the expiry of a year after the death of the intestate. *Slater v. Slater*, 3 Cham. R., 1.

The plaintiff and another bought from a testator's executors and trustees certain real and personal estate; the real estate was subject to a mortgage, which the vendors agreed to pay; the purchasers paid their purchase money, but the vendors applied the same to pay other debts of the testator, and left the mortgage in part unpaid; the plaintiff having bought out his co-purchaser, filed a bill against the executors; a decree by consent was made, giving the plaintiff a lien on the testator's assets, ordering the defendants to pay personally what the plaintiff should fail to realize from the assets, and directing the accounts and inquiries usual in an administration suit; the estate was insufficient to pay all creditors; before the making of the decree a creditor of the estate had obtained judgment against the executors, and the Sheriff seized and sold goods of the testator in their hands: *Held*, that the plaintiff had no right to prevent the creditor from receiving the money. *Henry v. Sharp*, 18 Grant, 16.

Under the ordinary administration decree in respect of a testator's real and personal estate, the Master may take an account of timber cut with which the defendants are chargeable. *Stewart v. Fletcher*, 18 Grant, 21.

An administration order will not be granted where the grounds upon which it is claimed are properly the subject of a bill. *Re Macdonald*, 2 Cham. R., 29.

Though strict proof of the claim is not necessary, yet a *prima facie* case must be made before administration order will be granted. *Re Clarke*, 2 Cham. R., 57.

The order XV., providing for the administration of estates without bill, applies to simple cases only, and under it the Court will not grant an order containing special directions to enquire as to what would be proper to be allowed to the applicants (the widow and administrators) for improvements made

on the property, and for the maintenance of the infant children of the deceased. *Barry v. Brazill*, 1 Cham. R., 248.

The facts that an estate is small, that no imputation is made against the executors of it, and that it is unadvisable to incur legal expenses, are no answer to a motion by a legatee against the executors for the usual administration order. In re *Falconer*, 1 Cham. R., 273.

A bill filed by an administrator to obtain possession of certain chattels outstanding in the hands of a third party, and for administration of the estate, *held* multifarious both as against such third party and the persons interested in the estate. *Cole v. Glover*, 16 Grant, 392.

ADMISSION.

Of Evidence. See EVIDENCE.

Of Service. See SERVICE.

ADOPTION.

Of Contract. See PRINCIPAL AND AGENT.

Of Lease. See LEASE—LANDLORD AND TENANT.

ADULTERY.

See ALIMONY.

ADVANCES TO AND BY AGENTS.

See AGENCY—INVESTMENT OF MONEY BY AGENT—TRUSTEE—ADMINISTRATION.

To Executors. See ADMINISTRATION.

ADVANCEMENT.

See PARTITION, 6.

ADVERSE POSSESSION.

See STATUTE OF LIMITATIONS.

ADVERTISEMENT.

Of Sale. See INSOLVENCY.

Where, by an oversight, an advertisement had been inserted only three times instead of four, on an application for an order *pro con*, it was ordered that defendant be re-advertised the proper number of times. *Patrick v. Ross*, 2 Cham R., 459.

AFFIDAVITS.

See PRODUCTION OF DOCUMENTS—PRACTICE—INJUNCTION, I.(a)—EVIDENCE.

I. IN SUPPORT OF MOTION FOR INJUNCTION. See INJUNCTION.

II. GENERALLY.

1. *Swearing in Foreign Lands.*
2. *Where permitted to be read.*
3. *Stating Source of Information.*
4. *Of Non-payment of Mortgage Money.*
5. *Containing Alterations.*
6. *When considered Scandalous.*
7. *Entitling and Styling.*
8. *In a Suit against Insurance Company.*
9. *Filing further Affidavit.*
10. *Of Justification.*

II. (1) *Swearing in Foreign Land.*

When an affidavit purported to be sworn in the United States, before a notary public, and had the signature and notarial seal of such notary, held to be sufficient, without proof *aliunde* of such signature. *Merchants' Express Co. v. Morton*, 2 Cham. R., 319 ; 15 Grant, 274.

An affidavit sworn before a commissioner for taking affida-

vits in the English Court of Chancery, at Glasgow, was *held* to be insufficiently sworn. *McEwan v. Boulton*, 3 Cham. R., 63.

II. (2) *Where permitted to be read.*

On the granting of an interim injunction, the plaintiff had leave reserved to file a certain affidavit. On a subsequent day, on a postponement of the argument, it was arranged that no further affidavits should be filed; the affidavit referred to was then in Court, but not filed, but was filed at a subsequent hour of the day. On an objection being made to its reception, it was *held* receivable. *Merchants' Union Express Co. v. Morton*, 2 Cham. R., 319.

II. (3) *As to stating source of information.*

The order that affidavits shall state the source of information of a deponent who swears as to his information and belief is directory; and it is competent to the Court to relax it in a proper case, and when the ends of justice would be served by so doing. *Merchants' Express Co. v. Morton*, 2 Cham. R., 319; 15 Grant, 274.

An affidavit made by the plaintiff's agent, stating that he had the management of all the plaintiff's business in this country, was held as sufficiently shewing his source of information. The expression "owner in fee" held to mean the beneficial owner. *McEwan v. Boulton*, 2 Cham. R., 399.

II. (4) *Of Non-payment of Mortgage Money.*

The affidavit of the non-payment of the mortgage money in a suit for foreclosure or sale should not be made on the day the money is due, but subsequently. *Blong v. Kennedy*, 2 Cham. R., 453.

II. (5) *Containing Alterations.*

An affidavit will not be allowed to be read if it contains alterations which are not initialed by the commissioner before whom it is sworn. *Crippen v. Ogilvie*, 2 Cham R., 304.

All erasures and interlineations in affidavits must be initialed

by the commissioner before whom it was sworn, otherwise it cannot be read.

The notice of motion, in referring to an affidavit, should state the day on which it was filed. *McMartin v. Dartnell*, 2 Cham. R., 322.

II. (6) *When considered Scandalous.*

Where the affidavit on which a motion to review taxation was grounded, contained allegations of misconduct on the part of the solicitor altogether unconnected with the dealings between the solicitor and the client, such allegations were *held* to be scandalous, and were ordered to be struck out of the affidavits. *In re Fitch*, 2 Cham. R., 288.

II. (7) *Entitling and Styling.*

Where the affidavits on which an allowance of an appeal from a County Court Judge was sought, were not entitled in any Court, they were not allowed to be used. *Re Sharpe*, 2 Cham. R., 67.

Affidavits styled in short form—"A. B. and other plaintiffs," and "C. D. and other defendants"—were *held* to be sufficiently styled, and allowed to be read. *Dickey v. Heron*, 2 Cham. R., 490.

Affidavits need not, in their entitling, distinguish the parties by original and amended bill; it is sufficient to describe them as the now parties to the suit. *Somerville v. Kerr*, 2 Cham. R., 154.

II. (8) *In a Suit against an Insurance Company.*

In a suit against an Insurance Company, on a policy, the bill alleged that the policy had been destroyed: *Held*, that an affidavit of the fact must be annexed to the bill. *Workman v. Royal Insurance Company*, 16 Grant, 185.

II. (9) *Filing further Affidavit.*

A plaintiff having failed to amend his bill, till the time within which he could have done so had expired, owing to the pendency

of a motion to dismiss: *Held*, that the motion to dismiss was not a sufficient excuse for the delay; and *held*, further, that the plaintiff might, under the circumstances, file an additional affidavit, the former being insufficient, and then renew the application. *McDonell v. McKay*, 2 Cham. R., 243.

II. (10) *Of Justification*. See SECURITY FOR COSTS.

AFTER ACQUIRED ESTATE.

See WILL I.

AGENCY AND AGENT.

Evidence of. See JOINT PURCHASE. See also ADMINISTRATION—ADMINISTRATOR—PRINCIPAL AND AGENT.

I. IMPLIED.

II. INVESTMENT OF MONEY BY AGENT.

III. JOINT PURCHASE.

IV. AGENT PURCHASING OF TESTATOR WHEN ACTING FOR WIDOW.

I. IMPLIED.

There may be agency, and its duties and liabilities, without express words of appointment or acceptance; and where a party, in negotiating between two persons, the one desiring to sell, the other to buy certain land, gave the former to understand that he was acting in her interest, it was *held*, that she was entitled to the full price which he obtained for the land, though it exceeded the amount which he had obtained her consent to accept. *Wright v. Rankin*, 18 Grant, 625.

II. INVESTMENT OF MONEY BY AGENT.

A. Received \$1,200 belonging to his son-in-law, *R.*, and invested it, with other money of *A.*'s own, in the purchase of a farm, which cost \$3,200. *R.*, with his family, went into possession of the farm; and *A.*, the father-in-law, by his will,

devised the farm to *R.*'s wife and son jointly for the life of the wife, with remainder to the son in fee, subject to the payment of \$200 to a daughter of *R.*, and of \$600 to another person. It was assumed in the cause that *R.* was at the time of the purchase and thenceforward of unsound mind, and unable to give a valid assent to the transaction; and the Court held, on that assumption, he was entitled to the \$1,200 as against *A.*'s estate, and that the devise to his wife and son were no satisfaction of the claim; and also that he was probably entitled to a charge on the land for the debt. But the Court directed inquiries whether *R.* was, at the date of the transaction, of mental capacity to assent to the purchase; and, if so, whether he did assent thereto; also, inquiry as to the occupation of the land by *R.* and his family before the death of *A.*, and the value of such occupation. *Goodfellow v. Robertson*, 18 Grant, 572.

III. JOINT PURCHASE.

Where a purchase was made by a person in his own name, but in reality for the benefit of another, a personal decree against both, for the payment of the purchase money, was held to be correct. *Sanderson v. Burdett*, 18 Grant, 417.

Parol evidence of the agency was held admissible, and the purchaser, who entered into the contract in his own name, and who was a defendant, was held a good witness on behalf of the plaintiff against his co-purchaser, the other defendant. *Ib.*

IV. AGENT PURCHASING MORTGAGE OF TESTATOR WHEN ACTING FOR WIDOW.

The widow of an intestate obtained letters of administration, and her brother, a lawyer, acted for her as a friend, not professionally, in the management and settlement of the affairs of the estate. While so employed, the brother, with his own moneys, purchased a mortgage which had been created by the intestate: *Held*, that he was entitled to hold the mortgage for his own benefit. *Paul v. Johnson*, 12 Grant, 474.

AGREEMENT.

Construction of. See VENDOR AND PURCHASER.

By Parol. See PAROL AGREEMENT.

Not under Seal. See RAILWAY—CORPORATION.

As to Partition. See PARTITION.

ALIMONY AND ALIMONY SUITS.

I. WHETHER DECREE CAN BE MADE BY CONSENT.

II. INTERIM ALIMONY.

1. *Generally.*
2. *Where Excessive.*
3. *Where Refused.*
4. *Evidence of Marriage.*

III. MISCONDUCT OF WIFE AFTER DECREE.

IV. WRIT OF ARREST.

I. WHETHER DECREE CAN BE MADE BY CONSENT.

In a suit for alimony, the wife must prove herself aggrieved, otherwise there is no foundation upon which the Court can proceed to pronounce a decree for alimony. The defendant, in his answer to an alimony suit, denied the acts of cruelty charged against him by the bill, and no evidence was given to establish the charges of cruelty, but at the hearing the defendant consented to a decree being made for alimony; the Court, on the grounds of public policy, refused to interfere. *Gracey v. Gracey*, 17 Grant, 113.

In such a case, the parties could attain the object they had in view, of effecting a separation, by arrangement, out of Court; the objection to pronouncing the decree sought was, the Court doing that without proof of necessity for its intervention, which it can only properly do upon proof of such necessity. *Ib.*

II. INTERIM ALIMONY.

(1) *Generally.*

In an alimony case where the marriage is admitted or proved, interim alimony will be granted almost as a matter of course, notwithstanding that the defendant swears he is willing to receive and maintain the plaintiff. *Carr v. Carr*, 2 Cham. R., 71.

Interim alimony will be granted on *prima facie* proof of the marriage, although the validity of the marriage is disputed. *McGrath v. McGrath*, 2 Cham. R., 411,

An application for interim alimony must be upon notice. *Swinerton v. Swinerton*, 2 Cham. R., 453.

On a question arising under the Act 32 Vict., ch. 18, and the General Order 491, it was held that the plaintiff, in an alimony suit, is not entitled to the \$40 mentioned in the Order. *Gibb v. Gibb*, 2 Cham. R., 402.

II. (2) *Where Excessive.*

Where, in an alimony case, no one appearing for the defendant, an order had been made for interim alimony for the amount endorsed on the bill, which the defendant considered excessive; on a motion by him to set aside the order, a reference was directed on payment of the costs (*dives costs*) of the application. *Hooper v. Hooper*, 3 Cham. R., 114.

II. (3) *Where Refused.*

To obtain an order for interim alimony, the plaintiff must shew she is in want of means of support. Where the parties had been living separate for four years, and the wife did not allege that she was in want of means of support, and the husband swore she was in better circumstances than he was, an order was refused. *Bradley v. Bradley*, 3 Cham. R., 329.

II. (4) *Evidence of Marriage.*

On an application for interim alimony, the validity of the alleged marriage cannot be tried. If a marriage *de facto* is proved, it is sufficient. *Bradley v. Bradley*, 3 Cham. R., 329.

III. MISCONDUCT OF WIFE SUBSEQUENT TO DECREE.

After a decree for alimony had been made, and alimony paid for several years under it, the Court entertained a petition by the husband to be relieved from the decree, on the ground of adultery subsequently committed by the wife.

On the hearing of a petition by a husband to be relieved from a decree of alimony, an act of adultery was sworn to by two credible witnesses; and the general conduct of the wife raising no presumption in her favour, an order was made as prayed. *Severn v. Severn*, 14 Grant. 150.

IV. WRIT OF ARREST.

The Court, in an alimony suit, on a motion to discharge the defendant from arrest under a writ of arrest, will look into the merits of the case so far as to enable it to judge whether the plaintiff has reasonable grounds to expect to succeed in her case, and, in the absence of her shewing such fair and reasonable grounds, or in the event of the defendant displacing the *prima facie* case made by her on obtaining the writ, he will be discharged.

A writ of arrest had been granted on the affidavit of the plaintiff, alleging violence and ill-treatment on the part of the defendant, and shewing that the defendant had advertised his stock and farming implements for sale. A motion was made to set aside this writ, and the violence and ill-treatment were denied. The plaintiff was shewn to be a young robust woman, the defendant an old man of sixty-eight years, and the conduct of the plaintiff to have been violent, and immoral, and unchaste. On the denial of the defendant of any intention to leave the Province, and under the circumstances above stated, the writ was ordered to be set aside. *Macpherson v. Macpherson*, 2 Cham. R., 222.

ALLEGATION.

(*In Bill*) as to Notice.

See PLEADING—PRACTICE.

Of Destruction of Policy of Insurance.

In a suit against an Insurance Company, on a policy, the bill alleged that the policy had been destroyed: *Held*, that an affidavit of the fact must be annexed to the bill. *Workman v. Royal Insurance Co.*, 16 Grant, 185.

ALTERATION IN DEED.

See DEED.

AMENDING AND AMENDMENT.

I. AMENDING BILL.

1. *Where granted.*
2. *Time within which to be granted.*
3. *Where refused.*
4. *Effect of.*
5. *After Decree.*
6. *At the Hearing.*
7. *After Replication.*
8. *Amending Information.*
9. *Amending without prejudice to Injunction.*

II. AMENDING DECREE.

III. AMENDING INTERPLEADER ISSUE.

IV. AMENDING SHERIFF'S RETURN.

I. AMENDING BILL.

(1) *When leave to amend granted.*

In a suit for specific performance, the evidence having clearly established the bargain as alleged by the plaintiff, though his bill omitted to state the terms and mode of payment, as agreed upon; the Court offered him the alternative of taking a decree for specific performance, with payment of purchase money in hand; or to amend his bill, setting up the exact terms of the bargain. *Gillatley v. White*, 18 Grant, 1.

Where the pleadings and evidence were not before the Court in a satisfactory manner, and the Court being obliged to reject

evidence on both sides, as not material under the pleadings, was not satisfied as to the result being in accordance with the rights of the parties upon the actual facts, leave was given to amend on payment of the costs of the hearing, &c. *Conlin v. Elmer*, 16 Grant, 541.

A plaintiff having failed to amend his bill till the time within which he could do so had expired, owing to the pendency of a motion to dismiss; *held*, that the motion to dismiss was not a sufficient excuse for the delay; and *held*, further, that the plaintiff might, under the circumstances, file an additional affidavit, the former being insufficient, and then renew the application. *McDonell v. McKay*, 2 Cham. R., 243.

Where a question affected the right of the Government to the land granted in a patent, the Attorney-General was held to be a necessary party, and leave to amend was granted to enable him to be added as a party, although the defendant was in a position to move, and made a counter motion to dismiss, but the defendant was allowed costs. *Great Western Railway Co. v. Jones*, 2 Cham. R., 219.

An order to amend which is obtained before serving the bill, does not require service. Where a bill has been amended, and the affidavit was of service of "the bill," the Court presumed the bill served was the bill as it stood at the time of service. *Bolster v. Cochrane*, 2 Cham. R., 327.

The Court will allow an amendment where an unimportant mistake has been made in a name which has misled no one, and the right person been served.

The Court does not favour objections of this nature, and refused an enlargement; where, but for such mistake, the proceedings were regular, and ample notice had been given. *Re Fraser*, 2 Cham. R., 457.

Where there is a misjoinder of petitioners, the Court has jurisdiction, at the hearing of the petition, to allow the same to be amended by striking out the name of one of the petitioners. *Gilbert v. Jarvis*, 16 Grant, 294.

I. (2) *Time within which to be made.*

Where an order, giving leave to amend, has been granted, without limiting the time in which the amendments are to be made, such amendments should be made within fourteen days from the date of the granting of the order. Where circumstances prevented this being done, and no order dismissing the bill in the alternative of it not being done, was embodied in the order granting the leave to amend, the Referee *held* it to be competent to the Court to grant further time for amending, even on an application made after the fourteen days have expired, if a proper case was made out for it. *McMurray v. Grand Trunk Railway Co.*, 3 Cham. R., 306.

A plaintiff will be allowed to amend even after the expiration of twenty-eight days from filing the answer where such plaintiff has been delayed by the defendants not obeying the order to produce within proper time. *Archibald v. Hunter*, 2 Cham. R., 277.

I. (3) *Where Refused.*

Leave to amend was refused when the proposed amendment was an allegation that a mortgage was made whilst the mortgagor was in a state of insolvency. *Curtis v. Dale*, 2 Cham. R., 184.

Under an order to amend obtained on *præcipe*, a change in the venue laid in the bill cannot be made.

A cause set down for hearing at the county town named in the amendments was ordered to be struck out of the list. *Freitsch v. Winkler*, 3 Cham. R., 109.

An order to amend taken out pending a demurrer, without providing for the costs of the demurrer, was *held* to be irregular. *Lowe v. Campbell*, 3 Cham. R., 97.

After a bill had been filed by a judgment creditor, impeaching certain dealings between his debtor and a vendee of the debtor, the plaintiff allowed the writ against lands to run out for some time, but subsequently renewed it before the hearing: *Held*, not necessary to amend stating this fact, and that its

existence was no objection to the plaintiff obtaining relief at the hearing. *McDonald v. McLean*, 16 Grant, 665.

I. (4) *Amending, Effect of.*

Amending a bill does not necessarily give a defendant who has answered the original bill fresh time to answer.

Where amendments had been made by adding parties, and not affecting the original defendant who had answered, an application by such defendant to take the replication off the files, and strike the cause out of the hearing list, because he had not had time to answer, was refused. *Carter v. Adams*, 3 Cham. R., 57.

I. (5) *Amending Bill after Decree.*

After decree and report in a foreclosure suit, the Court refused to amend a mistake in the description of the property in the bill. *Lawrason v. Buckley*, 15 Grant, 585.

An application for leave to amend after decree will not be granted *ex parte*. *Bank of Montreal v. Power*, 2 Cham R., 47.

An application to amend after decree, under Order 438, by adding a party interested in the equity of redemption, need not be on petition, but is properly made on motion.

Where such a motion was opposed on the grounds of irregularity, as not being by petition, the costs of opposing it were refused. *Harrison v. Grier*, 2 Cham. R., 440.

No amendment of the bill will be allowed after decree. *Lawrason v. Buckley*, 2 Cham. R., 334.

I. (6) *At the hearing.*

The plaintiff had purchased certain mill premises from C, and afterwards sold the same; the bill alleged that on the sale C had agreed to accept the sub-purchaser as his debtor for the unpaid purchase money, and to discharge the plaintiff: at the hearing, the plaintiff failed to establish this agreement; but there were subsequent transactions, by means of which also the plaintiff claimed at the hearing to have been discharged. This

ground of relief not having been stated in the bill, the plaintiff had liberty to amend on payment of the costs of the day. *Allan v. Newman*, 16 Grant, 607.

Leave to amend is, at the hearing, granted in furtherance of justice, and not otherwise, and is not proper when the object is to enable the plaintiff, in a speculative suit, to take advantage of a technical defect in the defendant's title. *Cook v. Jones*, 17 Grant, 488.

I. (7) *Amending after Replication.*

A plaintiff may amend after replication, by adding parties, without withdrawing his replication, upon payment of costs. *Johnson v. Cowan*, 2 Cham. R., 13.

I. (8) *Amending Information.*

Where an information has been amended by merely adding a party, by the direction of the Court, a motion to take the amended information off the files, because not signed by the Attorney-General, was refused. *Attorney-General v. The Toronto Street R. W. Co.*, 2 Cham. R., 321.

I. (9) *Amending without prejudice to Injunction.*

A motion to amend, without prejudice to an injunction, will not be granted *ex parte*.

If the amendments are such as could be made without a special application, the order can be obtained on *præcipe*; if not, notice must be given to the parties affected by the amendments. *McGregor v. Maud*, 2 Cham. R., 387.

Amendments of a material character will not be allowed, without prejudice to a pending motion for injunction. *Davy v. Davy*, 2 Cham. R., 81.

II. AMENDING DECREE.

A motion to amend a decree in which the pleadings and evidence, or anything beyond the judgment and decree, have to be looked at, must be presented in Court, and not in Chambers.

Under Order 562, the Referee will order such matters only as can regularly be brought on before him in Chambers to be heard before a Judge, if he thinks it proper. Where, on a petition to amend a decree, the petitioner asked in the alternative for a re-hearing, and that the Referee would adjourn that part of the application to be heard before a Judge, the Referee held it to be beyond his jurisdiction, and dismissed the petition with costs. *Lapp v. Lapp*, 3 Cham. R., 234.

The Referee's jurisdiction with regard to amending decrees considered, *Lapp v. Lapp*, 2 Cham. R., 234, affirmed. Leave to re-hear refused, after considerable delay on part of party seeking to re-hear, and where the grounds for re-hearing was an alleged error in the decree, which was not an obvious error, and caused no miscarriage of justice. *Lapp v. Lapp*, 4 Cham. R.

A consent decree may be amended on petition, if it is shewn that it contains terms which were not consented to. *Merchant's Bank v. Grant*, 3 Cham. R., 64.

A decree can only be amended on an application in Chambers, when it is not drawn in accordance with the judgment, or some necessary consequential direction has been omitted. *Watson v. Henderson*, 2 Cham. R., 370.

The Secretary in Chambers will not grant an order to amend a decree, except to correct a clerical error, or to make the decree conform with the judgment.

Where the decree omitted to direct that costs should be paid forthwith, an application to amend was refused. *Wilson v. Robertson*, 3 Cham. R., 100.

Where a decree, which had been taken out by the plaintiff in an administration suit, erroneously made provision for payment of certain annuities and legacies, in priority to the provision made by the will for the widow of the testator, the Court, upon the petition of the widow, directed the decree to be amended, but refused costs to either party. *Eadie v. McEwen*, —Re *Eadie*, 14 Grant, 404.

III. AMENDING INTERPLEADER ISSUE.

Where an interpleader issue had been granted to try the ownership of certain goods seized under *fi. fa.*, an interpleader issue was tendered by one party, which contained an error; the other side, whilst pointing out the error, refused to agree to its amendment, but gave notice that he would not accept or act on the issue, and then moved to set aside the writ of interpleader and notice of trial. The Secretary refused the application, and gave the other party leave to amend the issue *nunc pro tunc*, which decision, on appeal, was sustained. *Mulholland v. Downs*, 2 Cham. R., 233.

IV. AMENDING SHERIFF'S RETURN.

A Sheriff, in his advertisement of sale of lands seized under a *fi. fa.* from this Court, had described them as the lands of the defendant, when they were those of the plaintiff; on an application on notice, this return was allowed to be amended on payment of costs of the motion. *McCann v. Eastwood*, 2 Cham. R., 182.

ANCIENT DEED.

See DEED—EVIDENCE, I. 7.

ANNUAL PROFITS.

Maintenance—Charged on. See WILL.

ANNUITY.

In lieu of Dower—Interest on. See WILL.

No interest is allowable in respect of arrears of an annuity. *Goldsmith v. Goldsmith*, 17 Grant, 213.

ANSWER AND ANSWERING.

Answering Demurrable Bill. See PLEADING—PRACTICE.

1. *Time for.*
2. *After time expired.*
3. *Neglecting to give notice of.*
4. *Filing without corporate seal.*
5. *Swearing and identifying.*
6. *Transmitting answer.*
7. *Supplemental.*

1. *Time for.*

The time for answering is not changed by the Consolidated Orders. The period is four weeks, not a calendar month. *Irwin v. Lancashire Insurance Co.*, 2 Cham. R., 291.

2. *After time expired.*

Where service has been effected on an agent, and it can be shewn that the time allowed for answering is insufficient to enable him to communicate with his principal, and to get in the answer on an affidavit of a good defence on the merits, a defendant will be granted leave to file his answer, although an order *pro con.* has been taken. *Irwin v. Lancashire Insurance Co.*, 2 Cham. R., 293.

The Court is loth to debar a defendant from answering, when he shews he has a good defence on the merits, and that to refuse would or might amount to a denial of justice. Leave was granted to a defendant to answer under such circumstances, even after considerable delay on his part, he being put on terms as to costs, going to hearing, and otherwise. *Ritchie v. Gilbert*, 3 Cham. R., 377.

3. *Neglecting to give notice of.*

Where a defendant's solicitor files an answer, but neglects to give notice thereof, the Court will not order it to be taken off the files, but will extend to the plaintiff the time for taking

the next step in the cause, by such time as has been lost by the neglect in giving notice. *Parker v. Brown*, 3 Cham. R., 354.

4. *Filing without corporate seal.*

There is no authority for allowing a corporation to file an answer without seal, except by consent.

Where a stay of proceedings was asked, to enable the defendants to apply at law for a mandamus to compel the head of the corporation to affix the corporate seal to the answer, but it was not shewn that the majority of the shareholders approved of the answer; the application was refused with costs. *Gildersleeve v. Wolfe Island Railway and Canal Co.*, 3 Cham. R., 358.

5. *Swearing and identifying.*

The fact that an answer had been sworn before a Commissioner, who had been formerly concerned as solicitor in the cause, was not held to be ground for taking the answer off the files. *Gordon v. Johnson*, 2 Cham. R., 205.

On an application for leave to answer, it was held sufficient that a copy of the proposal answer was attached to the affidavit of verification. *Loudon v. Loudon*, 2 Cham. R., 40.

6. *Transmitting answer.*

Where an answer had been irregularly transmitted, it was ordered to be re-sworn within a given time, with costs against the defendant. *Gordon v. Johnson*, 2 Cham. R., 205.

7. *Supplemental answer.*

A defendant neglected to set up a sheriff's sale and deed (part of his chain of title), but evidence thereof was given, and the conveyance put in without objection, so that there was no surprise upon the plaintiff; the Court gave the defendant liberty to set them up by supplemental answer, if desired. *Beattie v. Mutton*, 14 Grant, 686.

ANTECEDENT DEBT.

See MORTGAGE.

APPEALING.

See MASTER—REFEREE—STAYING PROCEEDINGS—SECURITY FOR COSTS.

I. FROM CHAMBERS.

1. *Time for.*
2. *Cannot make new case.*
3. *Order must be drawn up.*
4. *Order on appeal a Chambers order.*
5. *Confined to case made before Referee.*
6. *Act relating to.*

II. FROM COURT.

1. *Where time expired.*
2. *Making Decree in appeal order of Court.*

III. FROM MASTER.

1. *Granted when delay accounted for.*
2. *For trifling amount.*
3. *Should be to the Court.*
4. *Stating grounds of appeal.*
5. *After long delay.*
6. *When dismissed without costs.*
7. *Miscellaneous.*

IV. FROM COUNTY COURT.

V. MISCELLANEOUS DECISIONS AS TO.

1. *Where question one of discretion.*
2. *By married woman.*
3. *Appeal Bond.*
4. *Appeal Books.*

I. FROM CHAMBERS.

I. (1) *Time for.*

A motion, by way of appeal from an order made in Chambers, must be actually made within the fourteen days limited by the Consolidated Orders; and it is not sufficient to give the notice within the fourteen days. *Aliter* in the case of an appeal

from a Master's report. *Jackson v. Gardiner*, 15 Grant, 425 ; S. C., 2 Cham. R., 385.

I. (2) *Cannot make new case.*

A party cannot use affidavits not used before the Secretary, or make a new case in appeal, nor will the Court entertain a motion to reinstate a bill based on grounds which might have been shewn in resisting a motion to dismiss. *Bank of Montreal v. Wilson*, 2 Cham. R., 117.

I. (3) *Order must be drawn up.*

Before an appeal will lie from the Secretary's decision, the order thereon must be drawn up and entered. *Gibb v. Murphy*, 2 Cham. R., 132.

I. (4) *Order on appeal a Chambers order.*

An order made by a judge, on an appeal from the Secretary, is a Chambers Order ; and if costs or further directions are reserved, they should be disposed of before a judge in Chambers, and the order made thereon entitled " In Chambers." Where, therefore, in such a case the cause was set down, and in the list of causes to be heard on further directions, it was *held* to be improperly set down, and the costs of the day given against the party setting it down. *Dudley v. Berzcy*, 2 Cham R., 460.

I. (5) *Confined to case made before Referee.*

On an appeal from the Referee, the case will be strictly confined to that made on the original motion, and only such pleadings or other documents as were read then will be allowed to be read.

The Court will inform itself what these were, and take notice of its own records and proceedings when necessary.

When a question arose as to what pleadings had been read on a motion, the Court sent for the Referee's notes, and was guided by them. *Perrin v. Perrin*, 3 Cham. R., 452.

I. (6) *Act relating thereto.* See 34 Vict., c. 10.

II. APPEALS FROM COURT.

1. *When time expired.*
2. *Making decree in appeal order of Court.*

II. (1) *When time expired.*

Leave to appeal was given to the plaintiff after the expiration of a year, where it appeared that delay had been caused by the depositions in the cause having been mislaid by one of the defendants, and where the defendants, a banking institution, had in the meantime stopped payment, and their affairs, which were very extensive, had passed into the hands of trustees ignorant of the matter. *Bank of Upper Canada v. Wallace*, 2 Cham. R., 169.

A party seeking leave to appeal, after the time limited, must account satisfactorily for the delay, and shew some reasonable grounds why such indulgence should be granted. A party will not be aided by the Court in setting up a technical defence to defeat a claim just in itself. Where leave to appeal, after the usual time, was asked under circumstances which, in an ordinary case, would have been sufficient to sustain the application, but the case sought to be made by the appellant was *strictissime juris*, and with the view of defeating an equitable claim, the motion was refused with costs. *Gilbert v. Jarvis*, 2 Cham. R., 259.

Leave to appeal after the time limited by the orders will not be granted, except under special circumstances, and on a strong case accounting for the delay. *Denison v. Denison*, 2 Cham. R., 333.

When a cause had been re-heard, and the original decree affirmed, and an appeal was brought within a year of the decree on re-hearing: *Held*, that the appeal should have been within a year of the original decree, and that, in consequence of the delay, a special application for leave to appeal was necessary. *Macfarlane v. Dickson*, 2 Cham. R., 38.

The Court will extend the time for appealing to the Court of Error and Appeal, upon the party appealing shewing reasonable

cause for the delay that has taken place. *Box v. Provincial Insurance Co.*, 2 Cham. R., 397.

The present practice of the Court, as established by decisions, limits the time for appealing to a year from the date of the original decree, where a cause has been re-heard, and afterwards carried to the Court of Appeal; but the fact of an application to extend the time for appealing being made before the expiry of a year from the decree on re-hearing, was looked on as furnishing cogent reason for a liberal exercise of the discretion vested in the Court to extend the time, and the time extended accordingly. *Tyler v. Webb*, 3 Cham. R., 33.

To obtain leave to appeal after the time for appealing has elapsed, the party applying must show "special circumstances."

Although the time for appealing counts from the date of the original decree, where a cause has been re-heard, and the decree affirmed; yet the fact that a cause has been re-heard will be taken into consideration on an application for leave to appeal after the time has expired.

A party's poverty is not of itself a sufficient excuse for delay, although the Court will not exclude it from consideration, but it will receive such a plea with caution. *Duff v. Barrett*, 3 Cham. R., 318.

The Court, although reluctant to shut out a party from the privilege of appealing, will not give leave to appeal after a long lapse of time, and where numerous sittings of the Court of Appeal have been held since the judgment. *Davidson v. Boomer*, 3 Cham. R., 375.

Where a defendant intended to appeal from a decision within the year allowed for the purpose, but deferred appealing at once in order to ascertain the result of a reference; and the time for giving notice was allowed to pass by a mistake of his solicitor, who resided in Ottawa, and erroneously supposed that he had a year to give the notice; the Court gave leave, on special terms, to appeal for the following Court. *Butler v. Church*, 3 Cham. R., 91.

II. (2) *Making decree in appeal order of Court.*

Semble, a motion to make a decree of the Court of Appeal an order of the Court of Chancery may be made in Chambers, if it is sought to make the order in the terms of the decree of the Court above; but, if further directions or new terms are necessary to carry out the decree in appeal, the motion should be to the Court. *Weir v. Mattheson*, 2 Cham. R., 10.

III. APPEAL FROM MASTER.

1. *Granted when delay accounted for.*
2. *For trifling amount.*
3. *Should be to Court.*
4. *Stating grounds of appeal.*
5. *After long delay.*
6. *When application for leave dismissed without costs.*
7. *Miscellaneous.*

III. (1) *Granted when delay accounted for.*

Where a proper case was made explaining the delay, leave to appeal from the Master's report was granted, although the time limited for appealing had expired.

It is not necessary, on such an application, to shew the sufficiency of the grounds for appealing. *McQueen v. McQueen*, 2 Cham. R., 471.

[*Note*.—See next case.]

Held, overruling *McQueen v. McQueen*, 2 Cham. R., 471, that on an application for leave to appeal from the Master's report, besides accounting for the delay, it is necessary that the party appealing should make out a *prima facie* case for appeal. *Dickson v. Avery*, 3 Cham. R., 222.

Appeals from the Master's ruling, as well as appeals from the Master's reports, should be to the Court, and not in Chambers. *Jay v. McDonell*, 2 Cham. R., 71.

III. (2) *For trifling amount.*

The Court will not entertain an appeal from the Master where the matter in question is one involving only a very

trifling amount, and no point of principle is involved ; where, therefore, an appeal was brought where the matter in question was only some \$6.00 or \$10.00, the appeal was dismissed with costs. *McQueen v. McQueen*, 2 Cham. R., 344.

III. (3) *Should be to Court.*

An appeal from a Master's certificate of costs should be to the Court, not to a Judge in Chambers. *Grahame v. Anderson*, 2 Cham. R., 303.

III. (4) *Stating grounds of appeal.*

On a motion for leave to appeal against a Master's report, after the fourteen days given by the general orders, it is not necessary to state in the notice of motion the points on which the party desires to appeal, provided they appear in the papers filed in support thereof. *Romanes v. Herns*, 2 Cham. R., 363.

III. (5) *After long delay.*

An appeal from a Master was allowed after an interval of six months (the long vacation intervening), when it was considered that the interests of justice warranted it. *Chard v. Myers*, 3 Cham. R., 120.

III. (6) *Where dismissed without costs.*

Where it was considered that the finding of the Master was, under the circumstances, a fit subject for discussion, the Court, although it dismissed an appeal from the finding of the Master, did so without costs. *Secord v. Terryberry*, 14 Grant, 172.

III. (7) *Miscellaneous.*

Where the judgment on an appeal from the Master's report enunciates a principle which is applicable to other parties and other points, the Master should so apply it in the further prosecution of the reference. *Denison v. Denison*, 17 Grant, 306.

Three parties made purchases before suit, and two of them only being charged by the Master with compound interest in respect of their respective purchase money, they appealed un-

successfully against the charge, and they afterwards appealed against the charge of simple interest only to the third party. *Held*, that such appeal was regular. *Id.*

The proper mode of appealing from the Master's certificate is by motion, and not by petition. *Re Ponton*, 15 Grant, 355.

To avoid expense, questions which arise in the Master's office on the construction of a will should, where practicable, be left for decision by the Court on further directions, instead of being brought before the Court by way of appeal from the Master's report. *Scott v. Scott*, 18 Grant, 66.

An objection of the Statute of Limitations cannot be made by an appellant against the Master's report, without having been taken before the Master. *Brigham v. Smith*, 18 Grant, 224.

IV. APPEAL FROM COUNTY COURT.

In appeals against the orders of the County Court, this Court will assume those orders to be correct until the contrary is shewn; and care must be taken to point out the defects on the pleadings and proceedings brought into this Court.

The defendant in a suit on the equity side of the County Court had, before being served with an injunction restraining the removal of a building, removed the same by direction of the City Inspector as being a nuisance, having been erected partly on the public street; notwithstanding this, an order was made by the Judge of the County Court for the committal of the defendant, who, without moving to dissolve the injunction on the facts, appealed to this Court: in making an order allowing the appeal, and directing the discharge of the defendant, the Court did so without giving him the costs of the application. *Murphy v. Morrison*, 14 Grant, 203.

In an appeal from a County Court Judge, an objection that no written order of discharge (against which it was sought to appeal) was produced, was considered fatal.

Where the appellant was described as William Darling, and

the opposing creditors appeared to be William Darling & Co., it was considered ground for refusing to entertain the appeal.

An appellant in insolvency must apply promptly. *Re Sharpe*, 2 Cham. R., 67.

V. MISCELLANEOUS DECISIONS AS TO.

See RECEIVER.

1. *Where question one of discretion.*
2. *By married woman.*
3. *Appeal Bond.*
4. *Appeal Books.*

V. (1) *Where question one of discretion.*

There is no appeal from a decision on a question which is by the practice purely within the discretion of the Judge. *Chard v. Meyers*, 3 Cham. R., 120.

V. (2) *By married woman.*

Where a married woman defended a suit in Chancery without a next friend, it was *held* that the husband and wife could appeal to the Court of Error and Appeal without any next friend. *Butler v. Church*, 18 Grant, 190.

V. (3) *Appeal Bond.*

It is not necessary to move for the allowance of an error and appeal bond, if not moved against within fourteen days from notice of filing given, it stands allowed. *Read v. Smith*, 2 Cham. R., 326.

V. (4) *Appeal Books.*

Appeal books should not contain evidence irrelevant to the issues. *Remarks of Draper, C.J.*; *Heward v. Heward*, 15 Grant, 530.

APPEALED CASES.

See DECISIONS APPEALED FROM, &c.

APPOINTMENT UNDER POWER.

The donee of a power of appointment made a will, not referring to the power, disposing of "the money now or at my death invested in mortgages or otherwise." The settled estate was invested in mortgages, and the donee had no other mortgages. *Held*, that the intention of the testatrix to appoint the settled estate sufficiently appeared. *Deedes v. Graham*, 16 Grant, 167.

Of Referee. See 34 VICT., c. 10.

APPROPRIATION OF PAYMENTS.

If money is not expressly appropriated by the party paying it, the party receiving it may appropriate it even upon a claim which he cannot enforce by suit. *Fraser v. Locie*, 10 Grant, 207.

A township treasurer had in his hands a large balance belonging to the township when he gave to the corporation new sureties. *Held*, that subsequent payments by the treasurer were applicable first to the discharge of that balance. *The Municipal Corporation of the Township of East Zorra v. Douglas*, 17 Grant, 462.

The rule, that general payments are appropriated first to the earliest items on the other side of an account, does not entitle a surety to claim that a concealed item, which, from its not being known, the debtor had not been charged with, should be deemed to have been satisfied by the moneys which had from time to time been paid by the debtor, and which had, when so paid, been charged by both parties against the other sums received by the debtor on behalf of the creditor. *The County of Frontenac v. Breden*, 17 Grant, 645.

ARBITRATOR AND ARBITRATION.

See ESPLANADE ACTS—INFANTS, 2—SCHOOL TAXES.

1. *Jurisdiction.*
2. *Staying proceedings.*
3. *Appointing Umpire.*
4. *Making award rule of Court.*
5. *Authority of.*

1. *Jurisdiction.*

This Court has jurisdiction to carry out the terms of an award which directs the payment of money, although the reference contains no submission to pay, where the reference has been made an order of the Court, and will, in such a case, order a reference to the Master, and not oblige the party to sue at law. *Armstrong v. Cayley*, 2 Cham. R., 163.

2. *Staying proceedings.*

Where parties had entered into an agreement to refer any future differences that might arise under a partnership between them to arbitration, and one filed a bill for an account, injunction and receiver, on an application for a stay of proceedings under the Common Law Procedure Act, the Secretary granted the order, though answer had been filed in the suit, and the bill contained allegations of fraud, it being evidently a case in which substantial justice between the parties could be done by arbitrators. *White v. Kirby*, 2 Cham. R., 414.

3. *Appointing Umpire.*

Where, under a submission, it was provided that arbitrators should appoint an umpire in case of disagreement, their appointing such an umpire was held sufficient evidence of their having disagreed, without any allegation of that fact on affidavit. *White v. Kirby*, 2 Cham. R., 452.

4. *Making award rule of Court.*

An application to make an award a rule of Court can properly be made in chambers on notice. *White v. Kirby*, 2 Cham. R., 452.

An award, in pursuance of a reference by the Court, will be

treated as a judicial act, and made an order of this Court as a matter of course. It is not necessary to wait until after a term before moving to make it an order of Court. *Allan v. O'Neil*, 2 Cham. R., 452.

5. *Authority of.*

When a submission was made to an arbitrator "to determine which of said several items of claim the estate of Mr. B. is bound as a matter of law to pay": *Held*, that this confined the authority to deciding the question of legal liability, and did not authorize the arbitrator to find sums payable; under such a submission, the arbitrator gave interest: *Held*, that he was authorized to consider the liability for interest, although he could not correctly find the amount due. *Armstrong v. Cayley*, 2 Cham. R., 128.

ARREST.

See WRIT OF ARREST—ALIMONY—ATTACHMENT.

ASSETS.

Deficiency of. See DOWER, V.

ASSIGNMENT.

Of Decree. See TRUSTEE—FRAUD.

I. EQUITABLE ASSIGNMENT.

II. ASSIGNOR AND ASSIGNEE.

III. PREFERENTIAL ASSIGNMENT.

IV. OF MORTGAGE BY ADMINISTRATRIX.

I. EQUITABLE ASSIGNMENT.

Where a party gave a draft on a corporation indebted to him, but the proper stamps were not on the draft when the same was discounted, and the holder neglected to put on double stamps, as required by the Statute, it was *held* not to constitute

an equitable assignment of the fund of the drawer in the hands of such corporation. But the drawer having written to the corporation directing them to pay the amount of such draft from the fund coming to him, such letter was held to constitute a good equitable assignment. *Robertson v. Grant*, 3 Cham. R., 331.

Although an order operates as an equitable assignment of a debt due to the drawer, and that without any acceptance by the drawer, still if the person to whom the order is given accepts it conditionally, agreeing only to give up his claim against the drawer on the order being accepted and paid, and if not paid, to return the order, and subsequently institutes proceedings against the drawer, in respect of such claim, he cannot afterwards proceed to enforce his equitable claim against the drawer. *Muir v. Waddell*, 14 Grant, 488.

II. ASSIGNOR AND ASSIGNEE. See INSOLVENCY.

Assignee for value without notice. See FRAUD.
Where legal estate outstanding.

The plaintiff having assigned the land in question, first to one C., and afterwards to one M., to secure certain advances, but, at the same time, had no title thereto, the Crown having given effect to the assignment to C., and issued the patent to him, the plaintiff sought to get in the legal estate outstanding in C., but without paying M. *Held*, under the maxim, "He that comes into equity must do equity," that he was first bound to pay the advances made by M. *Wiggins v. Meldrum*, 15 Grant, 377.

III. PREFERENTIAL ASSIGNMENT.

In 1857, A. made an assignment for the benefit of his creditors, and thereby provided for the preferential payment of all sums which other persons were liable for, as sureties or indorsers for him. *Held*, that the creditors to whom these secured sums were due were entitled to the benefit of this provision, and would not lose it by executing the deed of assignment, though it contained a clause releasing the debtor.

Where there was a controversy as to whether a purchaser bought subject to, or free from, a mortgage which was on the property, and there was no suggestion of danger in respect of the purchase money, the Court, in a very special case, refused to order payment of the amount into Court pending proceedings, though a conveyance had been executed, and the purchaser had gone into possession. *Mulholland v. Hamilton*, 15 Grant, 53.

IV. ASSIGNMENT OF MORTGAGE BY ADMINISTRATRIX.

The administratrix of a mortgagee executed an instrument purporting, in consideration of \$1.00, to assign the mortgage to the plaintiff, who was her brother, and he executed a bond binding him to pay her one-half of the mortgage money as received. *Held*, as between the plaintiff and the mortgagor, that this was a valid assignment. *Sinclair v. Dewar*, 17 Grant, 621.

V. ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

See FRAUDULENT ASSIGNMENT, 3.

Composition Deed—Time within which Creditors may come in under the Deed—Effect of Creditors neglecting to sign within the prescribed time—Accession by assent and acquiescence—Statute of Limitations.

Where a debtor made an assignment to trustees for the benefit of his creditors, providing by the terms of the instrument that the benefit conferred by it should be confined to those creditors who should execute it within one year, or notify the trustees in writing of their assent to it; and where one creditor had been aware of the terms of the deed, and had neglected to sign it, but had notified the trustees of his assent; and where another creditor had not been aware of the deed, but had taken no proceedings hostile to it, and had given his assent to it when it came to his knowledge; and where another, though aware of the deed and its provisions, had neither executed it, nor notified the trustees of his assent to it, but had never acted contrary, or taken proceedings hostile to it. *Held*,

that they were entitled to come in and prove their claims equally with those creditors who had executed the deed in accordance with its terms, and although they had allowed ten years to elapse.

Objection being made to the application being made in Chambers, and not by a separate suit: *Held*, that it was properly made in Chambers by petition in the original suit.

The Statute of Limitations being urged against the admission of the claims: *Held*, that the relation of trustee and cestui que trust had been established between the assignee and the creditors who had acquiesced in the deed, as well as those who had actually executed it, and that, therefore, the Statute was inoperative. There was also the additional reason, in two cases, that the Statute had never begun to run, owing to the creditors' rights of action having arisen after the debtor had absconded. *Gunn v. Adams*, 8 U. C. L. J., 211, 4 Cham. R.

ATTACHMENT.

See JUDGMENT CREDITOR.

I. OF DEBTS IN EQUITY.

II. MISCELLANEOUS DECISIONS.

III. TO SHERIFF IN QUEBEC.

I. OF DEBTS IN EQUITY.

A judgment creditor cannot attach or garnish, by means of a suit in equity, any debt for which he has not obtained an attaching order at law. *Blake v. Jarvis*, 17 Grant, 201.

II. MISCELLANEOUS DECISIONS.

Motion for attachment must be on notice. *Murphy v. Feehan*, 2 Cham. R., 53.

It is improper to have recourse to an attachment when the object sought can be attained without such process. Where, therefore, a party directed to execute a conveyance, had come

into town for the purpose of executing it, although after the period in which strictly it should have been done, and the plaintiff's solicitor, with a knowledge of these facts, issued an attachment, it was set aside with costs. *Mason v. Seeney*, 2 Cham. R., 220.

A party will not be committed for disobedience of an order, where the act ordered to be done is, in fact and in effect, merely the payment of money. *Male v. Bouchier*, 2 Cham. R., 254.

A direction to do an act "forthwith" is a sufficient compliance with orders 288 and 293.

Where, under an order so endorsed, a party was attached for disobedience, the attachment was held to be regular, and the parties only entitled to their discharge on compliance with it.

Where the attorney of the parties, directed to confess judgment at law, had been arrested for disobedience of the order, as well as the parties themselves, his arrest was held to be irregular, and his discharge ordered. *Wallace v. Acre*, 2 Cham. R., 392.

III. ATTACHMENT TO SHERIFF IN QUEBEC.

Where a trader in Ontario becomes insolvent, and an attachment in insolvency is issued to the Sheriff of the County in which he resides, the County Court Judge has jurisdiction to issue another attachment to the Sheriff of any county in Ontario, or of any district in Quebec in which the insolvent has property.

ATTORNEY AND CLIENT.

See SOLICITOR—SOLICITOR AND CLIENT—LIEN.

An attorney took a conveyance of certain property in trust for a client, but did not sign any writing acknowledging the trust. A parol agreement was subsequently entered into, that the attorney should accept the property in discharge of two notes which he held against the client. *Held*, that this agreement was binding on the attorney, though not in writing.

After the making of the agreement, the attorney put the two notes in suit, in the name of a third person, and obtained judgment by default. *Held*, that the judgment was no bar to a suit by the client for specific performance of the agreement. *Fleming v. Duncan*, 17 Grant, 76.

ATTORNEY-GENERAL.

See PARTIES—PLEADINGS.

AWARD.

See EXECUTORS, V.

BANKRUPT.

The plaintiff swore that, at the meeting of creditors, *B.* refused to give up the property without receiving from the creditors payment in full of his debt; and that they refused to pay. *Held*, that this did not put an end to their right to the property, or authorize the bankrupt to sue for it to his own use. *Hatch v. Ross*, 15 Grant, 96.

BANK STOCK.

See PRINCIPAL AND AGENT.

BEQUEST.

See CHARITABLE USES.

A bequest by a member of the Roman Catholic Church of a sum of money, for the purpose of paying for masses for his soul, is not void in this Province. *Elmsley v. Madden*, 18 Grant, 386.

BIDDINGS.

See OPENING BIDDINGS.

BILL.

Bill of Complaint. See PLEADINGS—PRACTICE.

Bill of Costs. See COSTS—SERVICE.

Bill to Redeem. See CONVEYANCE—PLEADINGS—PRACTICE.

Bill for Account. See ACCOUNT—DISMISSING BILL.

BOND.

For security for costs. See SECURITY FOR COSTS—APPEALING.

Construction of. See MUNICIPAL LAW.

BREACH OF INJUNCTION.

See INJUNCTION.

BUILDING SOCIETIES.

1. *Forfeiting shares.*
2. *Usury Laws.*
3. *Interest.*

1. *Forfeiting shares.*

Where, after the death of a member of a building society, his shares were permitted to run into arrear, *held* that, in the absence of a personal representative, the society could not take any steps to forfeit the shares, any more than they could have enforced their claim by action of debt, as provided by the Statute. *Glass v. Hope*, 14 Grant, 484.

In January, 1864, a non-borrowing member of a building society died intestate. No one administered to his estate until June, 1867. In that interval, his shares ran into arrear, and in consequence the society, in November, 1865, declared the shares forfeited, and carried the amount thereof to the credit of the profit and loss account. After the society had been wound up, or been supposed to have been wound up, and the assets distributed, letters of administration were obtained, and the administrator applied to the society to be admitted as a member

thereof, but was refused. *Held* (1), That the proceeding of the society to forfeit the shares in the absence of a personal representative was illegal; that they could not do so any more than they could proceed at law to enforce payment of the calls. (2) That the plaintiff (the administrator) was entitled to relief, and that the lapse of time between the attempted forfeiture of the shares and the procuring letters of administration was no answer to the plaintiff's claim.—[DRAFER, C.J., HAGARTY, C.J., WILSON, J., and GWYNNE, J., dissenting.] S. C., in appeal, 16 Grant, 420.

2. Usury Laws.

Building societies are virtually exempted from the operation of the Usury Laws. *The Freehold Permanent Building and Savings Society v. Choate*, 18 Grant, 412.

3. Interest.

In mortgages taken by a building society for advances to borrowing members it is not necessary to express in the instruments how much of the interest reserved is a bonus in respect of the sum advanced, and how much for interest. *Ib.*

CANAL.

Restraining sale of. See INJUNCTION.

Injunction granted, at the suit of the creditors of a canal company, who had a lien on the canal, against a sale thereof, under a subsequent execution. *The Town of Dundas v. The Desjardins Canal Co.*, 17 Grant, 27.

CAPITAL.

Payments out of. See INFANTS—WILL—MAINTENANCE.

CARRIAGE OF DECREE.

See DECREE VI.

CERTIFICATE.

Of Referee—Of Sheriff—Of Treasurer. See QUIETING TITLES.

CHAMBERS.

Motion in. See COMPENSATION, 2.

Appealing from. See APPEALING, 1.

Chambers Orders. See APPEALING, 1.

Chambers or Court application.

A motion which is strictly and properly a Court motion, will not be taken in Chambers by the consent of parties. A motion so made in Chambers was refused, but without costs. *Thompson v. Freeman*, 4 Cham. R., 1.

CHANCERY.

Jurisdiction of. See JURISDICTION.

The Court of Chancery has no jurisdiction to give relief to sureties on a recognizance in a criminal proceeding. *Rastall v. The Attorney-General (in Appeal)*, 18 Grant, 138.

CHANGING REFERENCE.

A plaintiff is entitled *prima facie* to have the reference to the Master who resides in the county in which the bill is filed; but this *prima facie* right may be rebutted by shewing sufficient grounds for the Court directing the reference to the Master at some other place.

Where an application of this kind is rested on the ground of expense, the difference in expense must in general be considerable; and where the application is rested on the ground of convenience, a slight or doubtful balance of convenience is not sufficient to deprive the plaintiff of his *prima facie* right; a reasonably clear case of preponderating convenience must be established by the defendant.

A man in extensive business, or a trustee, is not entitled, when a defendant, to have the reference to such place as suits him best, if there is no other strong ground for the change from the place selected by the plaintiff. *McNab v. McInnis*, 4 Cham. R., 53.

CHANGING SOLICITOR.

A solicitor may be changed without order. *Bailey v. Bailey*, 2 Cham. R., 57.

CHANGING VENUE.

The venue in a case should be selected with a due regard to the convenience of the suitors and of the witnesses. And if the venue laid in the bill is not so selected, an order to change it will be made.

The circumstance of the Master, at the town to which the venue was sought to be changed, having been at one time concerned as an arbitrator between the parties to the cause, was held no sufficient reason for not taking the suit before a judge there. *Mallory v. Mallory*, 2 Cham. R., 404.

When it is shewn that the convenience of witnesses would be better served by a change of venue, such change will be made without costs. *Chard v. Meyers*, 2 Cham. R., 391.

The Court grants a change of venue reluctantly where delay will be occasioned by the change, *Fisken v. Smith*, 491; see also *Baxter v. Campbell*, 2 Cham. R., 39.

The Court will not change the venue merely to enable a plaintiff to speed his cause, the more especially if the plaintiff has himself been guilty of delay in proceeding. *James v. James*, 3 Cham. R., 58.

In a bill relating to property in Toronto, there not being sufficient time to get the cause down for hearing at the next ensuing Toronto Sittings, the venue was laid at Whitby, with a view to bring the case to a hearing at the ensuing Sittings there; after answers, the defendants moved to change the venue

to Toronto, and filed affidavits stating that some of their witnesses were out of the jurisdiction, and the evidence of such witnesses could not be procured in time; that others were resident in Toronto, engaged on defendants' railway there, and their attendance at Whitby would interfere with the working of the railway at Toronto. The Court granted the motion on the defendants undertaking to abide by such order as the Court might make as to any damages which the delay caused by change of venue would occasion. *McMurray v. Grand Trunk Railway Company of Canada*, 3 Cham. R., 133.

CHARGE FOR IMPROVEMENTS.

See PARTITION.

CHARITABLE GIFTS.

Out of special fund. See WILL.

CHARITABLE USES.

1. *Bequest to.*
2. *Voluntary Bond.*
3. *Injunction.*

1. *Bequest to.*

A testator bequeathed £100 to the Society of St. Vincent de Paul, and directed the residue of his estate to be converted into cash, and paid to the House of Providence. These were voluntary unincorporated associations. *Held*, that, so far as they could be paid out of personalty, these legacies were good; and should be paid over to the persons having the management of the pecuniary affairs of the institutions named. *Elmsley v. Madden*, 18 Grant, 386.

2. *Voluntary Bond.*

A voluntary bond to a charity, purporting to bind the obligor and his heirs, and payable six months after the obligor's death,

cannot be enforced against the obligor's lands. *Anderson v. Paine*, 14 Grant, 110.

3. *Injunction.*

A judgment having been recovered against the obligor's executors on a voluntary bond in favour of a charity, and execution having been issued thereon against his lands, the Court, at the suit of the heirs, restrained further proceedings on such execution. *Anderson v. Paine*, 14 Grant, 110.

CHATTEL MORTGAGE.

An immaterial variation between a chattel mortgage and the copy subsequently filed does not invalidate the re-filing. *Walker v. Niles*, 18 Grant, 210.

A mistake in the number of the lot where the chattels were, was held to be immaterial under the circumstances.—*Ib.*

The statement annexed to the affidavit filed with the copy of the mortgage, did not give distinctly all the information required by the Act; but the affidavit and statement together contained all that was necessary. *Held*, sufficient. *Ib.*

The statement contained an item of \$2.25 as paid for re-filing, which the mortgagee had no right to charge. *Held*, not to vitiate the instrument. *Ib.*

A chattel mortgage was given for \$1070; it afterwards appeared that the amount was made up in part of a promissory note made and given by the mortgagee to the mortgagor at the time of the execution of the mortgage, and not paid for some months afterwards. *Held*, that, in the absence of fraud, the mortgage was valid. *Ib.*

CHILD.

Custody of child under twelve years of age.

The Court has an absolute right in its discretion to give the

custody of a child under twelve years of age to the mother. The Court exercised this right where the only evidence that the parents were living apart, through the fault of the husband, was the evidence of the wife; holding, that the Court might, in its discretion, in the interest of the child, direct the custody to be given to the mother in cases where the cause of her living apart is, on her own statement, justifiable; and the Judge is not prepared to say that he disbelieves such statement. *Re Davis*, 3 Cham. R., 277.

CHOSSES IN ACTION.

See SEQUESTRATION.

CHURCH PROPERTY.

See DEED, VII.

CLEARING AND CUTTING TIMBER.

See RECTOR'S LANDS.

CLERICAL ERROR.

Held, that a motion to correct a clerical error should be on notice. *Simpson v. Ottawa Railway*, 2 Cham. R., 12.

COMMISSION.

Commission to examine witnesses.

A commission cannot regularly be issued until after replication filed. *Royal Canadian Bank v. Cummer*, 2 Cham. R., 388.

All examinations under foreign commission must be by interrogatories, unless otherwise arranged by consent. *Gordon v. Elliott*, 2 Cham. R., 471.

The Master cannot *ex parte* issue a certificate for a foreign commission. *McLennan v. Helps*, 3 Cham. R., 193.

COMPENSATION.

See SEQUESTRATION—DOWER, V.—EXECUTORS, II.—ADMINISTRATORS, &c.

For deficiency. See SPECIFIC PERFORMANCE.

For services. See PRINCIPAL AND AGENT.

To Trustees and Executors. See ADMINISTRATION SUIT—TRUSTEES—EXECUTORS.

For growing crops.

The growing crops on land are part of, and go with, the freehold when it is sold. When, therefore, a tenant in possession at the time of sale carried away the growing crops, compensation was granted to the purchaser out of the purchase money, and the same order was made to extend to taxes due on the land and unpaid. *Stewart v. Hunter*, 2 Cham. R., 335.

For want of possession.

A motion for compensation for want of possession should be made in Court, not in Chambers. *O'Dea v. Sinnott*, 2 Cham. R., 446.

CONDITIONS OF SALE.

See SALE.

CONFIRMATION.

See VENDOR AND PURCHASER.

CONFIRMING SALE.

See SALE.

CONFLICTING EVIDENCE.

See QUIETING TITLES—AGENCY—MASTER'S FINDING.

CONSENT.

A motion which is strictly and properly a Court motion, will

not be taken in Chambers by the consent of parties. A motion so made in Chambers was refused, but without costs. *Thompson v. Freeman*, 4 Cham. R., 1.

By Solicitor. See *Bailey v. Bailey*, 2 Cham R., 58.

CONSIDERATION.

See DEED, V.

CONSTRUCTION.

[i.e. BUILDING.]

Of Esplanade. See ESPLANADE ACTS.

[RENDERING MEANING OF.]

Of Will. See WILL.

CONSTRUCTIVE NOTICE.

See REGISTRY LAW—NOTICE—PRACTICE.

CONTEMPT.

See INJUNCTION—ATTACHMENT.

1. *For not bringing in account.*
2. *No contempt until order to that effect.*
3. *Clearing contempt.*

1. *For not bringing in account.*

Where a party is in contempt for not bringing in accounts into the Master's office, it is a sufficient clearing of his contempt to bring in such accounts, and the sufficiency of them will not be looked into. *Clancy v. Patterson*, 2 Cham. R., 217.

When a party has been committed for not bringing in accounts, and it is shewn by certificate that the accounts have since been brought in, it cannot be urged on a motion for his

discharge that the accounts are insufficient. Nor will the payment of costs be made a condition precedent to his discharge. *Clark v. Clark*, 3 Cham. R., 67.

2. *No contempt until order to that effect.*

A party is not in contempt for non-compliance with an order of Court until the opposite party by some step brings him into contempt; if such party omits to do this, he cannot urge the contempt in bar to a proceeding by the party so in default, or urge it in extenuation of his own laches. *Gillespie v. Gillespie*, 2 Cham. R., 267.

3. *Clearing contempt.*

It is a sufficient clearing of contempt if a party has done the act ordered to be done, and paid the costs. It is not necessary that an order of Court clearing his contempt should be made unless he has been in custody, when an order is necessary for his discharge. *Duncan v. Trott*, 2 Cham. R., 487.

Where a defendant who had been in contempt for non-production of deeds, and afterwards produced, filed his affidavits and paid costs of contempt, moved to dismiss, and it was objected that he had not cleared his contempt, no order having been made to that effect, the Secretary overruled the objection. *Ib.*

CONTESTANTS.

Rights of, under Act for Quieting Titles. See QUIETING TITLES.

CONTRACT.

See SPECIFIC PERFORMANCE.

In restraint of trade.

Several incorporated companies and individuals, engaged in the manufacture and sale of salt, entered into an agreement, whereby it was stipulated that the several parties agreed to combine and amalgamate under the name of "The Canadian Salt Association," for the purpose of successfully working the

business of salt manufacturing, and to further develop and extend the same, and which provided that all parties to it should sell all salt manufactured by them through the trustees of the association, and should sell none except through the trustees. *Held*, on demurrer, that this agreement was not void, as contrary to public policy, or as tending to a monopoly, or being an undue restraint of trade; that it was not *ultra vires* of such of the contracting parties as were incorporated companies, but was such in its nature as the Court would enforce. *The Ontario Salt Co. v. The Merchants' Salt Co.*, 18 Grant, 540.

CONTRIBUTION.

1. *To pay costs of suit to stay waste.*
2. *By indorsers.*

1. *To pay costs of suit to stay waste.* See TENANT IN COMMON.
2. *By indorsers.*

Where two persons indorse a note for the accommodation of the maker, and the second indorser knows when he indorses that the first indorser is, like himself, an accommodation indorser, he must share equally the loss occasioned by the maker's default.—*Cockburn v. Johnston*, 15 Grant, 577.

As between accommodation indorsers, the Court will enforce the right of contribution, the same as in cases of other co-sureties.

Where a firm of two or more persons indorse in the copartnership name, the liability as sureties is a joint liability, and not the several liability of each partner. *Clipperton v. Spettigue*, 15 Grant, 269.

Accommodation indorsers, like other co-sureties, are liable to mutual contribution, unless this liability is controlled by contract; but such a limitation, if stipulated for, is binding. *Mitchell v. English*, 17 Grant, 303.

A note, indorsed by B. and C., for the accommodation of the

maker, being overdue, the maker, to provide funds for taking it up, procured another person, *D.*, to indorse for his accommodation a new note, and on his applying to his former indorsers for their signatures, untruly stated that he had sold goods to *D.*, who would be in funds to take up the note at maturity. The note was taken up by *D.*, who was the first indorser. *Held*, that he was entitled to contribution. *McKelvey v. Davis*, 17 Grant, 355.

D.'s suit for contribution was not brought for five years, nor until *C.* had become insolvent. *Held*, that *B.* must share with *D.* the loss ; that he might have had his liability ascertained, and might have paid the amount before *D.* sued. *Ib.*

CONVEYANCE.

By Insolvent. See INSOLVENT.

To Solicitor. See SOLICITOR AND CLIENT.

I. AGREEMENT TO RE-SELL.

II. FRAUDULENT.

1. *Secret Trust.*
2. *Costs.*
3. *Witness.*
4. *Improvements.*

III. PURCHASER FOR VALUE, &c.

IV. AS A MARRIAGE SETTLEMENT.

I. AGREEMENT TO RE-SELL.

In 1838, *A.* having a life estate in certain land, his wife having the remainder in fee, *A.* being also owner in fee of property adjoining, and executions against his lands at the suit of *B.* and others being in the sheriff's hands, *A.* and his wife agreed verbally with *B.* that *B.* should purchase at sheriff's sale ; that they also would execute a conveyance to *B.*, and that he should re-sell to them. Accordingly, *B.* bought at the sheriff's sale ; and *A.* and his wife executed a conveyance to *B.*, but the wife was not examined before magistrates until

1841. At the same time that this omission was supplied, two bonds were executed, one by *B.* for re-selling the property to *A.* and his wife, on payment of the money (the amount of the executions); and the other by *A.* and wife for payment of the money; they agreeing that, in case of default, they would give up possession, and that any intermediate payments should be retained by *B.* as rent. In 1842, new bonds to the same effect were exchanged, naming a larger sum in order to cover some further advances which *B.* had meanwhile made to *A.* *A.* and wife remained in possession until default, and were then ejected. After *A.*'s death, his widow filed a bill to redeem, claiming that the parties were in effect mortgagors and mortgagee. Chancellor *VanKoughnet* so held, and made a decree for redemption, but the decree was reversed in appeal. [SPRAGGE, C., dissenting.] *Monk v. Kyle*, 17 Grant, 537.

II. FRAUDULENT.

(1) *Secret Trust.*

The plaintiff had executed a conveyance of land, without consideration, for the purpose of avoiding an execution which it was supposed would be issued against his grantor, upon the secret trust or understanding that, when called upon, the grantee would re-convey. The Court, under these circumstances, refused to enforce a re-conveyance, and a bill filed for that purpose was dismissed with costs. *Emes v. Barber*, 15 Grant, 679.

II. (2) *Costs.*

A bill was filed by creditors, impeaching a conveyance as fraudulent; but the facts proved failed to establish more than a case of suspicions against the *bona fides* of the transaction; and the same relief having been sought in a bill by other creditors, who were also the personal representatives of the debtor, and which relief was refused, the Court, in dismissing the present bill, did so with costs, notwithstanding the reasons for doubting the *bona fides* of the transaction.

II. (3) *Witness.*

The widow of the grantor in a deed impeached as fraudulent

against creditors was entitled to a legacy under the will of her husband. *Held*, that, notwithstanding such interest on her part, she was a competent witness to prove notice as against the purchasers from the grantee in the impeached deed.

II. (4) *Improvements.*

Where a deed is set aside as fraudulent against creditors, a purchaser from the grantee in the impeached deed will not be allowed for improvements made by him upon the property. *Scott v. Hunter*, 14 Grant, 376.

III. PURCHASE FOR VALUE WITHOUT NOTICE.

A sale of land was effected, subject to a mortgage created by a former owner. *Held*, that this circumstance did not preclude the purchaser from setting up the defence of a purchase for value without notice. *Campion v. Fairbairn*, 15 Grant, 674.

IV. AS A MARRIAGE SETTLEMENT.

A deed purporting to be a bargain and sale, in consideration of £1,000, and bearing date the day before the marriage of the grantor to the grantee, was impeached by a subsequent creditor of the grantor. There was no evidence of any prior negotiation for a marriage settlement. The deed was not executed by the grantee, and there was no evidence that it was known to her, or any one acting for her, until long after the marriage. The Court of Appeal, however, being satisfied that the deed was executed as a marriage settlement, and not considering there was any proof of a fraudulent intent, upheld the deed, and varied the decree made in the Court below accordingly, with costs. [VAN KOUGHNET, C., J. WILSON, J., and MOWAT, V.C., dissenting.] *Mulholland v. Williamson*, 14 Grant, 291. In appeal.

This varies decree of Court below reported, 12 Grant, 91.

CORPORATION AND CORPORATE SEAL.

Some of the parties executing a deed were corporate bodies, and the witnessing clause was expressed, "In witness whereof,

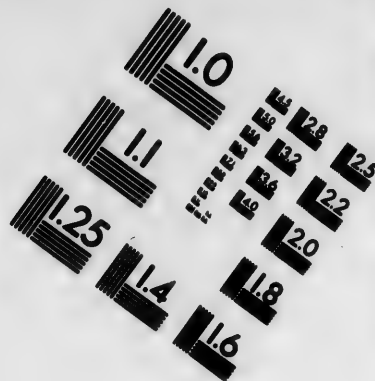
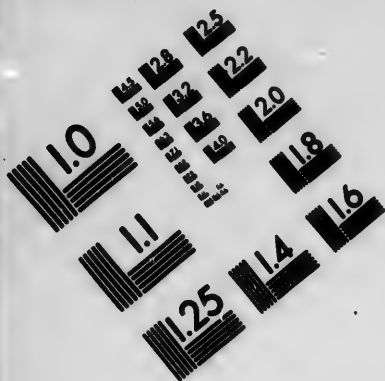
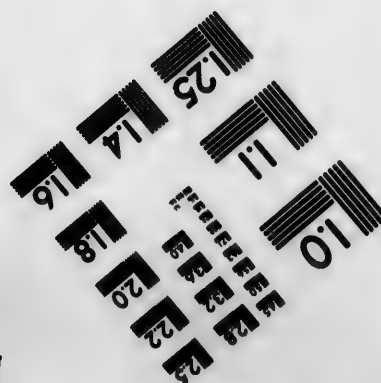
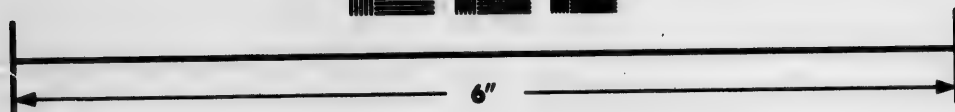
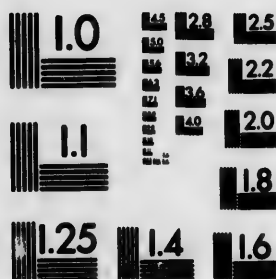


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the said parties hereto have hereunto set their hands and seals," &c., and the seals were all simple wafer seals. *Held*, that, in the absence of evidence shewing these not to be the proper corporate seals of the companies, this was a sufficient sealing on the part of the incorporated companies. *The Ontario Salt Co. v. The Merchants' Salt Co.*, 18 Grant, 581.

The agreement was not under the corporate seal. The company received \$5,500 for their claim to the property, by way of compromise, from a director who had availed himself of the plaintiff's communication to the directors, to obtain secretly a grant of the property to himself personally. It was *held*, that the plaintiff was entitled to share this sum, and that the want of the seal was no defence. *McDonald v. The Upper Canada Mining Company*, 15 Grant, 179.

See also *Hamilton v. Dennis*, 12 Grant, 325.

CORPUS.

Power to tenant for life to dispose of. See WILL.

Legacies charged on. See WILL.

COUNTY COURT.

See COSTS.

Appealing from. See APPEALING, IV—JURISDICTION, 5.

COUNTY TREASURER.

County money should be deposited to a separate account, and should not be unnecessarily mixed up with the treasurer's private money. *Peers v. Oxford*, 7 Grant, 472

COURT.

Appealing from. See APPEALING, II.

COSTS.

Of Administration. See ADMINISTRATION.

Of Executors. See EXECUTORS.

See also COUNTY COURT SUIT—CONVEYANCE, II. 2—DAMAGES, 4—DEMURRER, 5—INFANTS—INFORMATION—DOWER—POSTPONING HEARING—PRINCIPAL AND AGENT—TAXATION. And see *passim* the subject out of which the question of costs arises.

OF COSTS GENERALLY.

MISCELLANEOUS CASES RELATING TO.

1. *Taxation of.*
2. *County Court.*
3. *Relaxation.*
4. *Miscellaneous.*
5. *When further prosecution of suit becomes unnecessary.*
6. *Of a former suit for same cause.*
7. *Where Crown a party.*
8. *Vendor and Purchaser—Shewing title.*
9. *Where refused.*
10. *Interlocutory.*
11. *Of Executor de son tort.*
12. *Time for rendering bill of.*
13. *Issuing fi. fi. for.*
14. *Of Guardian.*
15. *Of Infants.*
16. *Of Executors disclaiming—Assignee disclaiming.*
17. *Of Defendants severing in defence.*
18. *Of irregularity in settling down.*
19. *Of ex parte application—Of abandoned motion—Of not proceeding to hearing.*
20. *Of suit when subject matter settled.*
21. *Of bill unnecessary filed.*
22. *Counsel fee, when taxable.*
23. *When refused to an Executor.*
24. *When refused on ex parte application.*
25. *Of Plaintiff claiming a wrong construction.*

26. *County Court jurisdiction.*
27. *Of partnership accounts.*
28. *When refused to either party.*
29. *Refused to a successful Appellant.*
30. *Against estate of person not Trustee.*
31. *Of unnecessary proceeding.*
32. *Of Chambers motion made in Court.*

1. *Taxation.*

Where, on an application by a solicitor for a taxation of his bill of costs, the client disputed the retainer as to the whole bill, and also set up the Statute of Frauds, it was *held* that the Court had jurisdiction to refer these defences to the Master.

An order of course for the taxation of costs is not to be discharged for the omission therefrom of any reference to defences of which the petitioners had no previous intimation. *Re Bacon*, 3 Cham. R., 79.

Practice defined as to the manner in which the Master will tax solicitor's costs for professional services rendered in the sale of lands, and collection and transmission of the purchase money. *In re Richardson*, 3 Cham. R., 144.

An order will not be granted for a taxation of costs before a Master in an outer county even on a consent. *Re Solicitors*, 3 Cham. R., 90.

2. *County Court.*

Where a solicitor has funds of a client in his possession, or has papers over which he claims a lien, he is subject to the summary jurisdiction of this Court, which will order delivery and taxation of his bills, and the payment over of any balance, notwithstanding that the services for which he claims have been wholly in County Court proceedings. *Re Prince*, 3 Cham. R., 282.

3. *Relaxation, where refused.*

Where there were two suits by a solicitor for the same object, the Master refused in one of the two suits, without a

special order, to tax as between party and party, more than part of the costs; and it appearing that, as between solicitor and client, no part of that bill could have been recovered, the Court refused to interfere with the taxation. *Spence v. Clemow*, 15 Grant, 584.

Although the Courts will interfere and order a retaxation of costs, even after a judgment has been obtained for them when the overcharges are gross and excessive, yet a client must come promptly, more especially when the relationship of solicitor or client has ceased to exist, to obtain such relief, and it will not be granted if the amount overpaid is small.

Where the alleged excess overpaid was only \$15, making about one-twelfth of the whole bill, and the application was not made until after great delay; the Referee refused an order for retaxation, and his decision was upheld on appeal. *Re Scott*, 3 Cham R., 467.

4. *Miscellaneous.*

Where a defendant has obeyed an order, and tendered a sufficient sum for the costs thereof, which the plaintiff's solicitor declined to accept, the defendant was given his costs of motion, less the sum tendered. *Franklin v. Bradley*, 2 Cham. R., 444.

The Court will not hold a party who has been in contempt for not obeying an order in gaol for non-payment of the costs occasioned by his contempt. *Pherrill v. Pherrill*, 2 Cham. R., 444.

A party appearing to ask costs on a notice irregularly served does not thereby waive the irregularity. *Fisken v. Smith*, 3 Cham. R., 74.

5. *When further prosecution of a suit becomes unnecessary.*

Where the object of a suit has been attained, the proper course is for the plaintiff, if he seeks costs, to apply to the defendant to have the question of costs disposed of on motion; unless he does so, he will not be given the extra costs occasioned by going on to a hearing. *Query*: Will such a motion

be entertained at all, except by consent. *Semble*, if the defendant refuses consent to the costs being disposed of on motion, the plaintiff will get his extra costs of going to hearing. *Webb v. McArthur*, 3 Cham. R., 364.

6. *Costs of a former suit for same cause.*

Where, after notice of motion to stay proceedings until the costs of a former suit for the same cause of action should be paid, such costs are paid, the costs of the motion to stay proceedings will be made costs in the cause. *Little v. Hawkins*, 3 Cham. R., 78.

7. *Where Crown a party.*

The rule that the Crown neither claims nor pays costs is that which the Court favours as most consistent with the dignity of the Crown, and practice of the Court; and where the Crown is made a party in consequence of the discharge of an international duty, and out of courtesy, or for form's sake, having no real or substantial interest in the question at issue, and no interest would have suffered, and no loss accrued by the Crown disclaiming or not appearing, the Court will certainly not order costs to be paid to the Attorney-General. *United States v. Denison*, 2 Cham. R., 263.

8. *Vendor and Purchaser, shewing good title.*

A purchaser, whose vendor died, and who had paid the purchase money, partly to the vendor in his lifetime, and the balance to his administrator, brought an action to recover back the purchase money, when a bill for an injunction was filed, a good title was subsequently shewn; the purchaser, the defendant in the injunction suit, was ordered to pay the costs down to the hearing of the cause. *Van Wormer v. Harding*, 2 Cham. R., 199.

9. *Where refused.*

A bill for sale was filed by a *puiſne* incumbrancer, and prior incumbrancers and mortgagees were made parties in the Master's office, and a decree on further directions made for payment according to priority. The proceeds of a sale proved insufficient

to pay the first incumbrancer. An application on part of the plaintiff to have his costs of suit and of sale paid out of such proceeds, in preference to the first incumbrancer, was refused with costs. *Grange v. Barber*, 2 Cham. R., 189.

10. *Interlocutory.*

When the Registrar is directed to fix the amount of interlocutory costs, a bill of such costs should be filed. *Saunders v. Furnivall*, 2 Cham. R., 55.

11. *Of Executor de son tort.*

Where an executor and trustee named in a will had acted as such to the advantage of the estate, without having proved the will, he was allowed his costs, as between party and party, of an administration suit to which he was a party defendant, excepting some costs which he had needlessly incurred. *Sunley v. McCrae*, 2 Cham. R., 231.

12. *Time for rendering bill of.*

The month which the Statute requires to elapse before a solicitor can take proceedings to recover costs must be reckoned exclusive of the day on which the bill is rendered and the day on which the petition to tax is presented. *Re Morphy & Kerr*, 2 Cham. R., 56.

13. *Issuing fi. fa. for.*

It is irregular to take out a *fi. fa.* the instant costs are taxed, without allowing a reasonable time to the solicitor whose client has to pay them, to communicate the result of the taxation. *Cullen v. Cullen*, 2 Cham. R., 94.

14. *Of Guardian.*

The Court will direct the costs of the guardian to be paid before granting a vesting order to the purchaser. *Thorne v. Chute*, 2 Cham. R., 221.

15. *Infants.*

In a case where infants were interested, and it was necessary

to have the conveyance settled by the Master, and one of the parties to the conveyance being out of the jurisdiction, it also became necessary to obtain a vesting order; the Referee allowed the purchaser the extra costs so incurred. *Re McMorris*, 3 Cham. R., 430.

16. *Of Executors disclaiming.*

A question being raised as to executors, and it being shewn that they disclaimed all interest when applied to, no costs occasioned by such question were allowed. *Re McMorris*, 3 Cham. R., 430.

Disclaimer.

To a bill of foreclosure, an assignee in insolvency filed an answer and disclaimer, admitting the statements of the bill, and alleging that he was willing, and offered before being served with the bill, to release his right to the property, but not alleging that he had made the offer to the plaintiff, or to whom he did make it. *Held*, that the defendant was not entitled to costs. *Drury v. O'Neil*, 15 Grant, 123.

17. *Costs of defendants made parties in the Master's Office severing in their defence.*

The first part of General Order 315 applies to cases where several persons are acting in the same interest, and where costs are to be apportioned among them. It does not empower the Master to deprive any one of his entire costs where the decree gives costs generally. A surviving trustee, and the representatives of a deceased trustee, are not within the rule which prevents trustees severing in their defence at the risk of having but one set of costs between them. *Reid v. Stephens*, 3 Cham. R., 372.

18. *Of irregularity in setting down.*

If a cause irregularly set down for hearing by the plaintiff is struck out upon defendant's motion in Chambers with costs, this entitles the defendant to tax costs of the application only, and not the costs of preparing for hearing. *Frietsch v. Winkler*, 3 Cham. R., 141.

19. *Ex parte application*—Practice as to costs of abandoned motion
—Costs of not proceeding to hearing according to notice.

An application for costs of not proceeding to hearing according to notice will not be granted *ex parte*. The practice discussed, *Armour v. Noble*, 3 Cham. R., 99, considered. *Jardine v. Hope*, 3 Cham. R., 197.

20. *Of suit when subject matter settled.*

The rule of this Court, that when the subject matter of a suit is settled by defendant before decree, the question of costs cannot be disposed of on a summary application by plaintiff, unless the defendant consents, applies to mortgage suits.

A defendant in such a case may insist on the suit going to hearing, as there may be grounds on which he may be relieved from costs. Where, under such circumstances, the Referee refused an application by plaintiff, for the payment by defendant of the costs of the suit, an appeal from such order was dismissed with costs. *McLean v. Cross*, 3 Cham. R., 432.

21. *Of bill unnecessarily filed.*

Where a bill had been filed on a mortgage on which only a small sum for interest had become due two days previously, and the defendant's solicitor had called at the plaintiff's solicitor's office, and left word that he was ready to pay the money; the Court refused the plaintiff his costs, and *held* the bill was unnecessarily and improperly filed. *McLean v. Cross*, 3 Cham. R., 432.

In case a creditor brings an administration suit, after being informed that there are no assets applicable to the payment of his claim, if the information appear by the result to have been substantially correct, he may have to pay the costs of the suit. *The City Bank v. Scatterd*, 18 Grant, 185.

22. *Counsel fee—Where taxable.*

A counsel fee on hearing is not taxable until the cause has been set down for hearing, and notice of hearing given. *Dewar v. Orr*, 3 Cham. R., 141.

23. *When refused to an Executor.*

Where an executor obtained the usual order for the administration of his testator's estate, and, upon the hearing, on further directions, no reason was shewn for invoking the aid of the Court, and the guardian for the infants did not object in any way to the course taken by the executor, the Court refused both parties their costs. *Springer v. Clarke*, 15 Grant, 667.

24. *Where granted on ex parte application.*

Costs incurred on setting down a cause, and afterwards countermanding notice of setting down, were granted on an *ex parte* application. *Armour v. Noble*, 3 Cham. R., 99.

25. *Of a Plaintiff claiming a wrong construction, &c.*

Where a plaintiff claiming under a will, insisted on a construction which was decided against her, whereby her claim was considerably reduced, she was, nevertheless, under the circumstances of the case, held entitled to the costs of the suit. *Goldsmith v. Goldsmith*, 17 Grant, 213.

26. *County Court jurisdiction.*

An administration suit by a person interested to an amount less than \$200 in an estate which considerably exceeded \$800, and against which a debt proved (and the only debt proved) exceeded that sum, was held not to be within the equity jurisdiction of the County Court. *Ib.*

27. *Of partnership accounts.*

The rule which charges the costs of taking partnership accounts on both parties is not to be applied where it would be tantamount to the denial of any remedy. *Woolans v. Vansickle*, 17 Grant, 451.

28. *Where refused to either party.*

The plaintiff failed in that part of his suit which rendered a bill necessary, and the other objects of the suit could have been attained by less expensive proceedings. It being considered that, in case the latter course had been adopted, the costs to th

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insolvent estate would have been about equal to the costs incurred by it in defending the suit, no costs were given to either party. *Darling v. Wilson*, 16 Grant, 255.

Costs of appeal from Master's report.

Three persons having entered into several contracts, in the name of one of the three, for the construction of portions of a railroad, without any written articles of agreement as to the share each should have after the completion of the works, disputed as to the share each should have in the contracts, and a bill was filed by one of them to have an account taken, claiming a larger share in the profits than the Master allowed him by his report, from which all parties appealed, being dissatisfied therewith, and, by arrangement, the Court below affirmed the finding of the Master, with the view of taking the opinion of this Court thereon. The Court, on affirming the order of the Court below, refused the costs of the appeal to either party. *Nichols v. McDonald*, in appeal, 8 Grant, 106.

See also *Merrill v. Ellis*. 1 Cham. R., 303.

29. *Refused to a successful Appellant.*

Where an appeal from the Master was dismissed, on a ground appearing for the first time on the appeal, and had not been taken in the Master's office, the Court refused to give costs to the successful parties. *Low v. Morrison*, 14 Grant, 188.

The beneficial owner of land omitted to have the paper title thereto in his own name, and thus enabled his son, who held such title, to mislead parties into accepting a mortgage thereon from the son. The Court, though unable to refuse him relief, in a suit brought to set aside such mortgage, under the circumstances, refused him his costs. *Gray v. Coucher*, 15 Grant, 419.

30. *Against estate of person not Trustee.*

The costs payable out of an estate to persons not trustees thereof, were directed to be taxed between party and party only. *Gray v. Hatch*, 18 Grant, 72.

31. *Of unnecessary proceedings.*

Where the executor has power under a will to sell real estate for the payment of debts and legacies ; and there was available in money more than enough to pay the debts, the Court, considering a suit for administration unnecessary, refused the executor the costs, and also his commission. *Graham v. Robson*, 17 Grant, 318.

In a suit by a residuary legatee for the administration of an estate, the plaintiff represents all the residuary legatees ; and the other residuary legatees are not entitled, as of course, to charge the general estate with the costs of appearing by another solicitor in the Master's office : to entitle them to such costs, some sufficient reason must be shewn for their being represented by a separate solicitor. *Gorham v. Gorham*, 17 Grant, 386.

In a partnership suit, the defendant's answer stated the terms of the partnership. The plaintiff, not accepting the statement, took the case to a hearing, instead of moving for decree, and he proved a slight difference, which involved a further charge of £4 only against the defendant. Held, that plaintiff should pay the extra costs occasioned by the hearing. *Woolans v. Van sickle*, 17 Grant, 451.

32. *Of Chambers motion made in Court.*

Where a party moves in Court for what should properly be moved for in Chambers, the Court will not allow the party so moving any costs of the application, even if the Court feels itself called upon to grant the motion. *Murney v. Courtney*, 10 Grant, 52.

COVENANT.

1. *Construction of.*
2. *Not to sue.*
3. *In restraint of trade.*

1. *Construction of, in equity.* See RIPARIAN PROPRIETORS.

2. *Not to sue.*

A stipulation for discharge of obligation of Grant, 63.

See also

3. *In restraint of trade.*

The plaintiff's change of business from one C., and that the contract was made and that Grant, 10

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A stipulation not to sue one of two judgment debtors is no discharge of the other, though there should be no express reservation of rights as against such other. *Dewar v. Sparling*, 18 Grant, 633.

See also DISCHARGE OF ONE OF SEVERAL JOINT DEBTORS.

3. *In restraint of trade.*

The plaintiff purchased the defendant's business as an exchange broker at Kingston, and the latter agreed not to go into the business there again. The plaintiff afterwards sold out to one C., and entered into a like agreement with him. *Held*, that the plaintiff, after this sale, had not such an interest in the contract with the defendant as entitled him to an injunction, and that his remedy, if any, was at law. *Jones v. Wooley*, 16 Grant, 106.

CREDITOR.

See MORTGAGOR AND MORTGAGEE—PARTNERS AND PARTNERSHIP—FRAUD—CONVEYANCE—EQUITABLE ESTATES—MARRIED WOMAN.

Where a *bona fide* transaction takes place between a failing debtor and a favoured creditor, it is the duty of the creditor to employ all practicable means to free the transaction from undeserved suspicion, and to afford to the other creditors reasonable satisfaction as to the real character of the transaction; and if this duty is neglected, the favoured creditor may have to bear his own costs of afterwards establishing the transaction, if impeached in this Court by the other creditors whom it disappointed. *Healy v. Daniels*, 14 Grant, 633.

CROWN AND CROWN LANDS.

Right to judgment recovered by trespassers for timber cut on Crown Lands.

Where timber which was unlawfully taken from Crown property was subsequently taken by force out of the possession of

the first taker, and the latter recovered a judgment against the trespassers, which included the value of the timber: *Held*, that the Crown was entitled to claim as much of their payment as represented the value of the timber, exclusive of the labour and money expended upon it. *The Attorney-General v. Price*, 15 Grant, 304.

Sale of.

Where the Crown Lands Department has had before it the evidence and claims of counter claimants, and a patent is directed to issue to one of them, this Court has no power to review the decision of the Commissioner; although it might, under the circumstances, have taken a different view of the case in the first instance from that taken by the Commissioner. *Kennedy v. Lawlor*, 14 Grant, 224.

CROWN PATENT.

REPEAL OF, &c.

1. *Onus of proof.*
2. *Impeaching for fraud—What plaintiff must shew.*
3. *Bill by a squatter.*
4. *Possession.*
5. *Where patent issued after decease of Trustee.*
6. *Functions of Court with regard to the rights of claimants.*

1. *Onus of Proof.*

Where a bill is filed by a private individual, to repeal letters patent, on the ground of error, the onus of proof is on the plaintiff, though it may to some extent involve proof of a negative.

Where it appeared that the Commissioner of Crown Lands, in deciding between rival claimants to a lot of land, to which neither claimant had any right, was under a false impression as to a matter of fact, and the fact had not been untruly stated by the party in whose favour the Commissioner decided, and was not shown to be material; the Court *held* that the error did not constitute a sufficient ground for setting aside the patent at the

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2. *Impeaching for fraud--What plaintiff must shew.*

A bill by a private individual, impeaching a patent for fraud or error, must shew that the plaintiff's interest arose before the impeached patent was secured. This rule applies whether the plaintiff's interest is under another patent for the same land, or under a contract of purchase. *Mutchmore v. Davis*, in appeal, 14 Grant, 346.

3. *Bill by a squatter.*

A bill by a squatter, to set aside a patent on the ground of fraud or error, must allege the custom of the Crown in favour of squatters, and such other facts as may shew his interest in obtaining the rescision of the patent. *Cosgrove v. Corbett*, 14 Grant, 617.

4. *Possession.*

Possession of Crown lands by a person who entered under an agreement with another, to clear and improve for the latter, on stipulated terms, is not such possession as entitles the occupant to maintain a bill to set aside a patent to the latter, on grounds of fraud or error unconnected with his own interest. *Cosgrove v. Corbett*, 14 Grant, 617.

5. *Where patent issued after decease of grantee.*

A patent was issued in favour of a person as the daughter of an U. E. Loyalist, who had died six months previously. *Held*, that her heir could not file a bill to set aside a conveyance executed under a power of attorney from her alleged to have been forged. *Brouse v. Crane*, 14 Grant, 677.

6. *Functions of Court as to the rights of claimants to patent.*

It is no part of the functions of this Court to take evidence, or find facts, upon which the officers of the Crown may act in the disposition of the rights of claimants to grants of Crown lands. *Brouse v. Crane*, 14 Grant, 677.

CROSS-EXAMINING A DEFENDANT.

See EVIDENCE—PRACTICE.

CO-SURETIES.

See CONTRIBUTION.

CUTTING TIMBER AND CLEARING.

Construction of covenant as to. See RECTORS' LANDS.

CUSTODY OF CHILD.

See CHILD.

DAMAGES.

1. *For detention of machinery.*
2. *When amount small.*
3. *Jurisdiction where wrongful act discontinued.*
4. *Costs.*

1. *For detention of Machinery.*

A debtor, whose business was the manufacture of reaping machines, conveyed his personal property to trustees; and having afterwards compounded with them and his other creditors, the trustees entered into a covenant to re-assign to him the property on certain terms and conditions. The debtor filed a bill, alleging, amongst other things, a breach of the covenant, and claiming damages. *Held*, that he might be entitled to damages for the detention of the machinery necessary for the carrying on his business; and it was referred to the Master to inquire into the nature of the personal property withheld, and if it was machinery, or chattels of a like nature, to inquire and report as to damages. *Scott v. Wilson*, 16 Grant, 182.

2. *Where amount small.*

The plaintiff filed a bill for the protection of the timber on certain land which he claimed to own; at the hearing, the

Court retained the bill, with liberty to the plaintiff to bring an action; the plaintiff brought the action, and recovered a verdict for \$20. It appearing that the question in issue was the plaintiff's title to the land, he was *held* entitled to a decree, with costs, notwithstanding the small amount of damage which had been actually done by the defendant. *McAlpine v. Eckfrid*, 16 Grant, 595.

3. *Jurisdiction where wrongful act discontinued.*

Where a plaintiff filed a bill for an injunction and payment of damages; and it appeared that the wrongful act complained of had, without his knowledge, been discontinued before the suit was commenced: *Held*, that the Court had not jurisdiction to make a decree for the damages. *Brockington v. Palmer*, 18 Grant, 458.

4. *Costs.*

The defendant having neglected to inform the plaintiff of the discontinuance, though applied to respecting it, before suit, the bill was dismissed without costs. *Ib.*

DECISIONS APPEALED, AFFIRMED, OVERRULED,
OR RESTRICTED.

DECISIONS AFFIRMED, AND THE SUBJECT MATTER TO
WHICH THEY RELATE.

Abel v. McPherson. 18 Grant, 437. Affirms decree, 17 Grant, 23. PATENT FOR INVENTION—NOVELTY.

Attorney-General v. Rasall. 18 Grant, 138. Affirms decree. [SPRAGGE, C., and MOWA, V.C., dissenting.] JURISDICTION—RECOGNISANCE IN CRIMINAL CASES.

Bank of Upper Canada v. Fanning. 18 Grant, 391. Affirms, 17 Grant, 514. TAX TITLES.

Bank, Upper Canada, v. Wallace. MORTGAGE. Affirms de-

cree ; holding as reported in the report on appeal, 16 Grant, 280. See MORTGAGE, &c.

Barker v. Eccles. 18 Grant, 440. Affirms decree, 17 Grant, 631. [GWYNNE, J., dissenting.] MORTGAGE. PURCHASE OF EQUITY OF REDEMPTION. See MORTGAGE, &c.

Boulton v. Church Society. Affirms judgment overruling demurrer. PARTIES. See PARTIES—PLEADINGS—JUDGES.

Box v. Provincial Insurance Co. 18 Grant, 280. Affirms decree, 15 Grant, 337. [SPRAGGE, C., MORRISON, J., and GWYNNE, J., dissenting.] SALE OF WHEAT, &c.—WAREHOUSEMAN.

Buller v. Church. 18 Grant, 190. Affirms decree, 16 Grant, 215. [DRAPER, C.J., GWYNNE, J., and GALT, J., dissenting.] MARRIED WOMAN—STATUTE OF FRAUDS—PRACTICE.

Connor v. Douglass. TAX SALE. 15 Grant, 456. Affirms decision. Judgment on hearing before the Chancellor, with judgment on appeal, reported as above.

Crippen v. Ogilvie. 18 Grant, 253. Affirms, 15 Grant, 490. RELEASE OF EQUITY OF REDEMPTION.

Davidson v. Boomer. 18 Grant, 475. Affirms decree. WILL—DOWER—ANNUITY IN LIEU OF.

Heenan v. Dewar. 18 Grant, 438. Affirms decree, 17 Grant, 638. ACQUIESCENCE—NUISANCE. See these headings.

Kirkpatrick v. Lyster. Affirms decree made on the original hearing reported, 13 Grant, 323. RECTOR. See RECTORS' AND RECTORY LANDS. Case in appeal reported, 16 Grant, 17.

McGregor v. Rapelje. 18 Grant, 446. Affirms decree, 17 Grant, 38. MARRIAGE SETTLEMENT. See MARRIAGE SETTLEMENT.

Martin v. Martin. 15 Grant, 586. Affirms decree reported on original hearing, 12 Grant, 500. WILL. See WILL.

Mossopp v. Mason. 18 Grant, 453. As to sale of goodwill,

a question in the cause, affirms, 17 Grant, 360. Varies as to covenant in restraint of trade.

Rykert v. Miller. 14 Grant, 1. PURCHASE FOR VALUE WITHOUT NOTICE. Affirmed on rehearing. 13 Decr., 1867. 14 Grant, 123.

Smith v. Ratti. 15 Grant, 473. FERRY. Sustains judgment overruling demurrer reported, 13 Grant, 696. See FERRY.

Stephens v. Simpson. 18 Grant, 594. Affirms decree, 12 Grant, 493. [A. WILSON, J., dissenting.] REGISTRY LAWS—POSSESSION.

Totten v. Douglass. 18 Grant, 341. Affirms decree, 16 Grant, 243. [MOWAT, V.C., dissenting.] MORTGAGE—FRAUD ON CREDITORS—ASSIGNEE FOR VALUE WITHOUT NOTICE.

Washburn v. Ferris. FRAUD—TRUST. See FRAUD. Affirms decree reported. 14 Grant, 514. Case in appeal reported, 16 Grant, 76.

DECREES VARIED, AND THE SUBJECT MATTERS TO
TO WHICH THEY RELATE.

Hendrey v. English. 18 Grant, 119. Varies decree. MILL DAM—PAROL AGREEMENT.

Lindsay Petroleum Oil Company v. Hurd. 17 Grant, 115. Varies decree, 16 Grant, 147. [SPRAGGE, C., and MOWAT, V.C., dissenting.] VENDOR AND PURCHASER—AGENCY—REPAYMENT OF PROFITS.

Mossopp v. Mason. 18 Grant, 453. Varies, 17 Grant, 360. AS TO COVENANT IN RESTRAINT OF TRADE.

Mulholland v. Williamson. 14 Grant, 291. Varies decree of Court below, reported, 12 Grant, 91. [VAN KOUGHNET, C., J. WILSON, J., and MOWAT, V.C., dissenting.] FRAUDULENT CONVEYANCES—MARRIAGE SETTLEMENT. See CONVEYANCE—MARRIAGE SETTLEMENT.

DECREES REVERSED, AND THE SUBJECT MATTERS TO WHICH THEY RELATE.

Bank, British North America v. Matthews. 8 Grant, 486. JUDGMENT CREDITOR—ATTACHMENT OF EQUITABLE CHUSES IN ACTION. Overruled by *Gilbert v. Jarvis*, 16 Grant, 265.

Bank, Montreal, v. Little. 17 Grant, 360. Reverses (on rehearing). 17 Grant, 313. SALE OF GOODWILL—INJUNCTION—LACHES.

Beamish v. Barrett. 16 Grant, 318. Reverses decree. [DRA-
PER, C.J., VANKOUGHNET, C., and SPRAGGE, V.C., dissenting.]
RIPARIAN PROPRIETORS—INJUNCTION.

Gilbert v. Jarvis. 16 Grant, 265. Reverses decree of Court below, and overrules. *Bank B. N. A. v. Matthews*, 8 Grant, 486.

Heward v. Heward. 15 Grant, 516. WILL—GENERAL DE-
VICE—POSSESSION. Reverses decree of Court below.

Lewis v. Robson. 18 Grant, 395. Reverses decree. PAROL
AGREEMENT.

McDonald v. McDonald. 16 Grant, 37. Reverses decree,
15 Grant, 545. LUNACY—VENDOR AND PURCHASER. See re-
spective headings.

McDonald v. McKay. 18 Grant, 98. Reverses decrees.
[DRAPER, C.J., and SPRAGGE, C., dissenting.] 15 Grant, 391.
TIMBER LIMITS—STATUTE OF FRAUDS.

McLeod v. Orton. 17 Grant, 84. Reversed on appeal.
PAROL AGREEMENT.

Monk v. Kyle. 17 Grant, 537. Reverses decree of Court
below. MORTGAGE AND AGREEMENT TO RE-SELL.

Mutchmore v. Davis. 14 Grant, 346. Reverses judgment of
Court below, allowing demurrer. [A. WILSON, J., and MOWAT,
V.C., dissenting.] Both judgments reported as above. CROWN
PATENTS, REPEAL OF—PLEADING—DEMURRER.

Towns of Dundas and Hamilton v. Milton. ROAD COMPANY.
18 Grant, 311. Reverses decree reported, 17 Grant, 31.
[SPRAGGE, C., and MOWAT, V.C., dissenting.] CANAL INTER-
SECTING ROAD—INJUNCTION. See CANAL—INJUNCTION.

DECREE.

On Præcipe, Appeal from. See PRACTICE.
Assignment of. See ASSIGNMENT.
Amending Decree. See AMENDING.
Against married woman. See MARRIED WOMAN.
See also DOWER, III. 1.

I. ON PRÆCIPE.

II. SETTING ASIDE AND VARYING.

1. *Mistake in direction in.*
2. *Pro confesso.*
3. *Improperly obtained—Concealment—
Misrepresentation.*
4. *Varying.*

III. FOR SALE.

IV. TIME FOR PROCEEDING ON.

V. ON BILL AND ANSWER.

VI. CARRIAGE OF.

VII. DECREE IN FORMER SUIT, DEFENCE OF.

I. ON PRÆCIPE.

Where, in a mortgage suit, a defendant by answer admitted the making of the mortgage, but denied an alleged agreement to pay an increased rate of interest, and set up a tender of the amount he contended was properly due on the mortgage, and claimed his costs, it was *held* not to be a case where the plaintiff was entitled to a *præcipe* decree.

The plaintiff's solicitor asked that, if the Referee considered the decree erroneous, it might be amended by inserting a direction for the Master to enquire as to the alleged tender. *Held,*

that such an amendment could not be made, the decree being one which could not be issued on *præcipe*, and that a decree so issued could contain no special directions or provisions. *Ross v. Vader*, 3 Cham. R., 236.

II. SETTING ASIDE AND VARYING.

(1) *Mistake in direction.*

On a bill to enforce a vendor's lien, the decree which, through oversight, directed that, in default of payment of the amount to be found due by the Master, an execution against the goods, &c., of the original purchaser should issue, without first selling the land, was set aside, at the instance of the purchaser, after the execution had been issued and placed in the hands of the Sheriff; the defendant, though served with the bill, having taken no proceedings in the case. *Switzer v. Ingham*, 14 Grant, 287.

II. (2) *Pro confesso.*

A motion to set aside a decree obtained by default, and not on the merits, was held to be properly made in Chambers. *Kline v. Kline*, 3 Cham. R., 79.

II. (3) *Improperly obtained—Concealment—Misrepresentation.*

A final decree of foreclosure had been obtained in a suit where the true position of parties was not disclosed, or material facts had been misrepresented, and a bill was subsequently filed to enforce a claim against the party beneficially interested as plaintiff in that suit. The Court refused to make a decree other than would have been proper had the true position of the parties to that suit been stated. *Wilson v. Hodgson*, 14 Grant, 543.

II. (4) *Varying decree.*

An incumbrancer, made a party in the Master's office, under the General Orders of the 6th of February, 1865, cannot, after the lapse of fourteen days from the service of the decree, file a petition to vary the decree, without first obtaining leave by an application in Chambers. *Roe v. Stanton*, 15 Grant, 137.

III. FOR SALE.

Where, under a decree for sale, certain lands were sold, and several years after, other lands were discovered affected by the same judgment, they were ordered to be sold. *Dickey v. Heron*, 2 Cham. R., 400.

IV. TIME FOR PROCEEDING ON.

The fourteen days given to proceed on a decree count from the pronouncing, not the entering of the decree. *Emes v. Emes* 2 Cham. R. 21.

V. ON BILL AND ANSWER.

When a cause is heard on bill and answer, the plaintiff has the right of electing to pay the costs of the day, and file replication and go to hearing in the usual way ; and even in a case where he had accepted the decree on bill and answer, and on coming to settle minutes, was dissatisfied with it, he was allowed the same option, on the ground that he could have exercised it on a re-hearing, or on appeal. *Russell v. Brecken* 2 Cham. R., 253.

VI. CARRIAGE OF.

No notice is necessary under No. 211, Consolidated Orders, to authorize the defendant to take the carriage of a decree out of the plaintiff's hands. *Smith v. Henderson*, 2 Cham. R., 304 ; *Emes v. Emes*, 2 Cham. R., 54.

VII. DECREE IN FORMER SUIT, DEFENCE OF.

See SPECIFIC PERFORMANCE.

DEDICATION.

In a new country like Canada, user of a road by the public is not to be too readily treated as evidence of an "intention" on the part of the owner to dedicate it. *Dunlop v. The County of York*, 16 Grant, 216.

DEED.

Bill to deliver up. See STATUTE OF FRAUDS.

Lost. See QUIETING TITLES.

See also CONVEYANCE—FRAUD—HUSBAND AND WIFE—MARRIED WOMAN—SHERIFF'S DEED.

- I. CONFIDENTIAL RELATIONSHIP.
- II. UNDUE INFLUENCE.
- III. RECTIFYING.
- IV. WHERE SET ASIDE.
- V. PAROL AGREEMENT AS TO CONSIDERATION.
- VI. ALTERATIONS IN.
- VII. OF CHURCH PROPERTY.
- VIII. MARRIED WOMAN'S DEEDS.
- IX. VOID IN PART.

I. CONFIDENTIAL RELATIONSHIP.

A widower, a shrewd, thrifty man, possessed of considerable real and personal estate, being apprehensive of a suit against him for breach of promise, determined to convey his land to his children, which he did, taking conditional notes for the purchase money, &c. The children did not occupy any confidential relation towards him, and the transaction was his own suggestion, without any influence or pressure on their part. What he retained was more than ample for his wants. *Held*, in a suit instituted by the father, seven years afterwards, that the deeds could not be impeached. *Luton v. Sanders*, 14 Grant, 537.

II. UNDUE INFLUENCE—FATHER TO SON.

In the case of a deed of gift from a father to a son, there is no presumption of undue influence in obtaining it.

Where a father made a deed of gift of all his property to his son, and there was no evidence of undue influence on the part of the son, or of his having taken an unconscientious advantage of his father, and the Court was satisfied that the deed had been duly executed, the son was not required to prove that the father, in making the deed, was aware of its nature and conse-

quences, and the deed was upheld. *Armstrong v. Armstrong*, 14 Grant, 528.

III. RECTIFYING DEED, &c.

On a separation of townships, a certain sum was found due to one of them (A.) by the other two, which remained united; and an instrument was executed acknowledging the amount to be due, and declaring it payable out of a fund supposed by all parties to be coming from the county to the two townships. It was subsequently discovered that no such sum was coming from the county, and the separated township (A.) thereupon filed a bill to correct the instrument, by making the debt payable generally. The defendants set up the mistake, and alleged that the restrictions as to the county fund was of the essence of the whole transaction; but the Court being satisfied that the debt was really due and payable, granted the relief prayed. *Arran (Township) v. Amabel and Albemarle (Townships)*, 15 Grant, 701.

A conveyance may be reformed by inserting additional parcels on clear parol evidence that the omission was by mutual mistake. *Forrester v. Campbell*, 17 Grant, 379.

The plaintiff was entitled to a conveyance from the defendant of half a lot of one hundred and sixty acres; the defendant wished to give fifty acres only; a friend of both, who was aware of the mutual rights, was requested by the plaintiff to obtain the deed as claimed by him; this person procured the defendant to execute a deed which conveyed fifty acres only, and which the defendant executed in that belief as this person knew; but he thought that it really conveyed the half lot, or eighty acres, to which the plaintiff was entitled; he took the deed to the plaintiff, telling him that it conveyed the eighty acres, on which the plaintiff accepted the deed; the plaintiff was not then aware of the different belief which the defendant had in signing it. *Held*, that the plaintiff was entitled to have the deed corrected, and made to embrace the eighty acres to which he was entitled. *McDonald v. Ferguson*, 17 Grant, 652.

Where relief refused.

A man deliberately, and with legal assistance, executed to his son-in-law a deed of his farm, subject to a life-estate in the grantor, in consideration of the grantee's agreeing to assist the grantor in working the place during his life, and to indemnify him against certain mortgages; there was no fraud or pretence of undue influence, and the grantor fully understood the meaning and effect of what he was doing; but quarrels subsequently arose, and the son-in-law left the farm; whereupon the father-in-law filed a bill to set aside the deed, on the ground that the conveyance incorrectly mentioned a consideration of \$2,000, and that the true consideration was not in writing; but as it appeared that the solicitor had recommended a writing, and that the grantor had voluntarily preferred to dispense with it, the Court declined to cancel the transaction. *Cameron v. Sutherland*, 17 Grant, 286.

For inadequate consideration.

An old man, greatly addicted to drinking, executed deeds of all his property, real and personal, to the tavern-keeper with whom he boarded, and he accepted, in consideration thereof, the bond of the latter for his support for life, which was an inadequate consideration. Within five months afterwards, the grantor died; and, one of his heirs having filed a bill to set aside the deeds, the Court made a decree for the plaintiff, with costs. *Hume v. Cook*, 16 Grant, 84.

Impeaching promissory note.

Where a debtor died, owing more than he had the means of paying, and a month afterwards his mother, who wished to pay all his debts, was induced to give her promissory note to one of the creditors for an amount which was less than one-eighth the value of her property, it was held that, in the absence of fraud, the note, though given without professional or other advice, could not be impeached in equity. *Campbell v. Balfour*, 16 Grant, 108.

Effect of fi. fa. as to lands fraudulently conveyed.

A *fi. fa.* lands was placed in the hands of the Sheriff, and,

before the return day, the plaintiffs filed their bill in respect of property of the debtor fraudulently conveyed away. During the pendency of this suit, the Sheriff returned the writ "no land," and the plaintiffs thereupon issued an *alias* writ, and delivered it to the Sheriff. *Held*, that the plaintiffs had not thereby lost their right to proceed with the suit in equity. *Stevenson v. Franklin*, 16 Grant, 139.

IV. WHERE SET ASIDE.

A person, being embarrassed, made a deed of land to his son, in alleged pursuance of a prior agreement; but he remained in possession of the property, and kept the deed in his own hands, and unregistered, for fifteen months; and there were other circumstances against the good faith of the transaction. *Held*, that the deed was void as against subsequent creditors, the prior creditors having been paid. *Ib.*

A father having obtained a conveyance of the interest of his sons under a marriage settlement, for an alleged consideration which did not exceed one-fifth of the value of such interest, and which was never paid, the transaction was set aside after the death of the settlor and one of the sons, in a suit by the devisees of the deceased son. *McGregor v. Rapelje*, 17 Grant, 38.

Confirmed on appeal. 18 Grant, 446.

V. PAROL AGREEMENT AS TO CONSIDERATION FOR.

What constitutes an agreement which the Court will enforce. See *McLeod v. Orton*, 17 Grant, 84. Which case was reversed on appeal, 12th January, 1871.

VI. ALTERATIONS IN.

In a suit against a widow by the assignee of a mortgage purporting to be executed by her late husband and herself, the plaintiff proved their signatures and that of the subscribing witness, who was also dead; the Judge by whom the defendant had been examined verified his certificate, though he did not recollect the circumstances; the document was a patched instrument, and the parts were not referred to in the attesting

clause, or otherwise authenticated. *Held*, on re-hearing [reversing the decree of Vice-Chancellor Mowat], that the unsupported evidence of the defendant, though believed by the Vice-Chancellor, was not sufficient to disprove the execution of the instrument by her, nor to throw on the plaintiff the onus of proving that the patching of the instrument had been before execution. [Mowat, V.C., dissenting.] *Northwood v. Keating*, 18 Grant, 643.

VII. OF CHURCH PROPERTY.

A deed, to come within the Statute 24 Vic., ch. 43, must have been registered within a year after the passing of it.

The advertisement required by the Act should specify the terms of sale.

A deed of church property ought to shew how the successors to the trustees named are to be appointed. Re *Baptist Church Property, Stratford*, 2 Cham, R., 388.

VIII. MARRIED WOMAN'S DEEDS.

Magistrates interested in the transaction are not competent to take the examination of a married woman for the conveyance of her land. The solicitor of the husband is not, as such, disqualified. *Romanes v. Fraser*, 16 Grant, 97.

Where, after the decease of one of the Justices of the Peace, by whom an examination was taken, the other, an old man of seventy-three, gave evidence that he did not recollect, and did not believe, that the wife was examined as the certificate stated, the Court gave credit to the certificate, notwithstanding the evidence. *Ib.*

IX. TRUST DEED VOID IN PART—LOTTERY.

A debtor conveyed his real estate to trustees for the benefit of his creditors, to be disposed of by the trustees—first, by a lottery, and failing that plan of disposition, then in trust to sell as the trustees should deem most advantageous. *Held*, that, although the deed was void as to the trust for a lottery, it was valid as to the other trusts therein declared.

A conveyance of property for the benefit of creditors may create a valid and irrevocable trust, although none of the creditors are either parties or privy to the deed; and when, in its inception, it is not so, subsequent dealings or communications between the debtor or his trustees and the creditors may render the trusts irrevocable. *Goodeve v. Manners*, 5 Grant, 114.

DEFECTIVE ABSTRACT.

See REGISTRAR.

DEFECTIVE SUIT.

When a suit becomes defective, and is proceeded with without an order of revivor being taken out, a subsequent application by petition, to supply the defect, by adding parties, is not improper, but the new parties may not be bound by the proceedings had in their absence. *Peck v. Bucke*, 2 Cham. R., 294.

DEFICIENCY.

See MORTGAGE, &c.

Of Assels. See FOREIGN FIRE INSURANCE Co.—DOWER—ADMINISTRATION SUIT.

Compensation for. See SPECIFIC PERFORMANCE.

Personal order for. See VENDOR'S LIEN.

DELAY.

See ASSIGNMENT, III., V.—CONVEYANCE, II.—PURCHASER—SEQUESTRATION.

DELAYING CREDITORS.

J. A. S. contracted to purchase from *M.*, on credit, a wood lot, No. 32, and to secure the price (£400), the purchaser's father gave a mortgage on his farm; this mortgage not being

paid, was foreclosed. Shortly afterwards, *M.* being still willing to receive his money, *J. A. S.* sold No. 32 for £300; this sum went to *M.*, part of the remaining £100 was satisfied by delivering to *M.* a pair of horses raised on the farm, valued at £62 10s.; and *W. S.*, another son of the owner, agreeing to pay the balance, £37 10s. The farm, by arrangement between all the parties, was conveyed to *W. S.*, who was not more than twenty-one years old, if as much. Held, that the transactions were, as respects the father and sons, a mere roundabout way of securing the farm from the creditors of the father, and the farm was ordered to be sold to pay the plaintiff, an execution creditor of the father. *McDonald v. McLean*, 16 Grant, 665.

DELAY IN PROSECUTION OF SUIT.

See INJUNCTION, I. (8).

There having been delay in bringing a suit for specific performance, and great delay in prosecuting it, *ESTEN*, V.C., at the hearing, made a decree directing a reference to the Master to inquire as to the cause of the latter delay; the Master reported that the cause was the plaintiff's poverty. On further directions, the bill was dismissed. [*VANKOUGHNET*, C., dissenting.] *McMahon v. O'Neil*, 16 Grant, 579.

Quære, whether delay in the prosecution of a suit for specific performance may be a bar to relief at the hearing—*VANKOUGHNET*, C., being of opinion that it is no bar; *ESTEN*, V.C., holding the opposite; and *SPRAGGE*, V.C., giving no opinion. *McMahon v. O'Neil*, 16 Grant, 579.

DELIVERY OF POSSESSION.

See POSSESSION.

Where a decree, by oversight, contained no direction as to giving up possession, a supplemental order, directing the delivery up of possession, was made on payment of costs. *Mason v. Seenev*, 2 Cham. R., 30.

DEMURRER AND DEMURRING.

See PLEADING—PARTIES—CONTRACT IN RESTRAINT OF
TRADE—MULTIFARIOUSNESS—CROWN PATENT.

1. *Filing pending motion.*
2. *Omission of formal part.*
3. *Time given to answer.*
4. *Want of parties and want of equity.*
5. *Costs.*
6. *Bill not charging notice.*
7. *Where overruled.*
8. *On several grounds.*

1. *Filing pending motion.*

Demurrer filed pending motion to take *pro con.*, held to be in time. *White v. Baskerville*, 2 Cham. R., 40.

2. *Omission of formal part.*

The omission of any formal part in the demurrer (such as the heading thereof) is an irregularity, which entitles the plaintiff to have the demurrer taken off the files, unless an amendment is permitted. *Bennett v. O'Meara*, 2 Cham. R., 167.

3. *Time given to answer, not to demur.*

Further time given to answer will not carry with it a right to demur after the usual time. Where a plaintiff's solicitor had given further time to answer, and, instead of answering, the defendant's solicitor filed a demurrer, the demurrer was ordered to be taken off the files. *Boulton v. Cameron*, 2 Cham. R., 41.

The giving time to answer does not authorize the defendant to demur after the time for answering has expired. *Chamberlain v. McDonald*, 2 Cham. R., 204.

4. *Want of parties, and want of equity.*

Where a demurrer is filed for want of parties, as well as for want of equity, the question of parties must be disposed of before the demurrer for want of equity can be argued. *Malcolm v. Malcolm*, 2 Cham. R., 200.

5. *Costs.*

A plaintiff amending his bill after service of a demurrer, and before the same has been set down for argument, although after a longer period than eight days has elapsed, is liable for 20s. costs only, and not for taxed costs. 3 Cham. R., 190.

6. *Bill not charging notice.*

The trustee of a mortgage, who had no authority to transfer it, did nevertheless sell it to a third person. *Held*, that a bill impeaching the transfer was not demurrable for not charging that the purchaser had taken the transfer with notice of the trust. *Ryckman v. The Canada Life Assurance Co.*, 17 Grant, 550.

7. *Where overruled.*

A bill having been filed on behalf of *cestuis que trust*, impeaching the conduct of a trustee, a demurrer thereto, because the *cestuis que trust* were not parties, was overruled. *Ib.*

8. *Several grounds of demurrer.*

A demurrer was filed for want of parties, and for want of equity; and on the argument it was admitted that the bill was defective as to parties. The Court refused to allow the other question to be argued until the bill was made perfect as to parties, and gave the plaintiff liberty to amend on payment of costs. *Malcolm v. Malcolm*, 14 Grant, 165.

DEPOSIT RECEIPT.

A condition, on a bank deposit receipt, that the receipt should, on payment, be given up to the bank, may not be void, but it does not entitle the bank to retain the money, in case the receipt is not forthcoming; the depositor is entitled, on proof of loss and indemnity (if required), to relief in equity. *Bank of Montreal v. Little*, 17 Grant, 685.

DEPOSITIONS.

A motion to read the depositions taken in another cause between other parties must be made on notice.

A motion for such an order made *ex parte* was refused. *Dunlop v. The Corporation of York*, 2 Cham. R., 417.

DEPUTY REGISTRARS.

See LOCAL MASTERS.

DETENTION OF PERSONAL PROPERTY.

See DAMAGES.

DESTROYED BOND.

The jurisdiction of equity in the case of lost bonds, exists also in the case of bonds which have been destroyed. *The County of Frontenac v. Breden*, 17 Grant, 645.

See also PRINCIPAL AND SURETY, 11.

DEVISE.

See WILL—ADMINISTRATOR, &c.—DOWER, III. 2—EXECUTORS.

I. GENERAL DEVISE.

II. OF LANDS CONTRACTED FOR.

III. To WIDOW.

I. GENERAL DEVISE.

A person having a power of attorney to sell certain lands, entered into possession after the death of the owner, with an intention to acquire the title, and died in possession, but before his possession had ripened into a title as against the representatives of the true owner : *Held*, that he had such an interest as passed under a general devise in his will. *Held* also, that

the devisees were entitled to claim the property in equity, as against the testator's heirs, who had gone into possession, but that a suit for the purpose could be successfully resisted by showing sufficient length of possession by the heirs after the testator's death, to give a title as against the plaintiff. *Heward v. Heward* (in Appeal), 15 Grant, 516.

II. OF LANDS CONTRACTED FOR.

A testator devised all his estate, real and personal, to his wife. At the time of making the will, he was lessee, with a right of purchase, of certain lands on which, after the execution of the will, he paid the balance of purchase money due, and obtained a conveyance thereof from the lessor. *Held*, that the subsequent acquisition of the fee was not a revocation of the devise, and that the widow was beneficially entitled to the land so purchased, but that the legal estate therein had passed to the heirs at law. *Sinclair v. Brown*, 17 Grant, 333.

III. To WIDOW.

Where a testator devised one parcel of land to his wife in lieu of dower, and another parcel without expressing that it was to be in lieu of dower, and then devised his remaining lands to other parties, and the will contained other evidence shewing an intention that such last mentioned devises should be free from dower; it was *held* that, on the widow electing to take dower, she forfeited not only the first mentioned parcel of land, but also the other. *Stewart v. Hunter*, 2 Cham. R., 336.

DISCHARGE.

Of one of several joint debtors.

The plaintiff recovered a judgment against two defendants, each of whom made a conveyance of his property. The plaintiff filed bills impeaching the conveyances respectively as fraudulent; in the one suit the plaintiff obtained a decree; and the other suit he settled, consenting to the bill therein being dismissed without costs. *Held*, that these circumstances did not neces-

sarily imply a settlement or discharge of the debt. *Dewar v. Sparling* 18 Grant, 633.

The only further evidence of the terms of settlement was contained in a letter from the plaintiff to his solicitors, stating, as to the second suit, that he had settled with the defendants, taking \$45 costs, and agreeing not to prosecute the suit, or look to the defendants therein for any portion of the judgment; and the letter inquired, "What about *lis pendens*? Will not bill have to be dismissed to have it removed?" *Held*, that the judgment against the other debtor was not discharged. *Ib.*

Of Surety. See PRINCIPAL AND SURETY.

DISCOVERY.

See EXAMINATION, I.

Principal and Agent.

Ordinarily, a bill for an account will not lie by an agent against a principal. *James v. Snarr*, 15 Grant, 229.

In Injunction cases.

Although, since the Common Law Procedure Act, bills for discovery in aid of defences at law are rare, yet they will lie; but in such a case the plaintiff cannot move for an injunction to restrain the proceedings at law until he has filed interrogatories; under special circumstances, however, the Court directed the defendant to submit to an examination in aid of such motion, or, in default, ordered the injunction to go. *James v. Snarr*, 15 Grant, 229.

Of new Evidence. See QUIETING TITLES.

DISMISSING BILL.

See LIS PENDENS.

THE PRACTICE IN CERTAIN CASES, AND UNDER THE FOLLOWING CIRCUMSTANCES :—

1. *In a redemption suit.*
1. (a) *After replication.*
2. *Ex parte after default.*
3. *By a surviving defendant.*
4. *Where claim satisfied.*
5. *After defendant had put in an insufficient affidavit on production.*
6. *By defendants recently added.*
7. *Discretionary with Court.*
8. *Plaintiff let in after order to dismiss.*
9. *Where office copy not served.*
10. *After decree.*
11. *Where order to dismiss refused.*
12. *Where delay through mistake of solicitor.*
13. *At the hearing.*
14. *On further directions.*

1. *In a redemption suit.*

In a redemption suit, where one of the two defendants had died, a motion was made on part of his executors and of another defendant to dismiss for want of prosecution—the same solicitor appearing for both. Notwithstanding some delay on the part of the plaintiff, which was not fully accounted for, the order was made in the alternative, that he revive and go to hearing on terms, or be dismissed.

Held, in accordance with the decision in *Spawn v. Nelles*, 1 Cham. R., 271, that a defendant is not obliged, after replication filed, to set the cause down for hearing in order to have the bill dismissed, but that he may apply in Chambers for an order to dismiss for want of prosecution.

Semble, where a suit abates by the death of one of the defendants, the defendant may move to dismiss for want of prosecution, without moving that he revive; but if deceased defendant and the surviving defendant be both represented by the same solicitor, the order will be to revive or bill dismissed. *Rice v. George*, 2 Cham. R., 74.

1. (a) *After replication.*

Semble, also, a motion to dismiss will be entertained even after replication is filed. *Ib.*

2. *Ex parte after default.*

Where defendant had moved to dismiss the plaintiff's bill, and the plaintiff had asked for time, which was granted, but the plaintiff failed to proceed within the time given : it was *held* that the defendant could move *ex parte* for the order to dismiss. *Burns v. Chisholm*, 2 Cham. R., 88.

Where security for costs is ordered to be perfected within a certain time, or the bill be dismissed, an order to dismiss may be granted *ex parte* on a certificate that no bond for security has been filed. *McCarroll v. McCarroll*, 2 Cham. R., 380.

3. *By a surviving defendant.*

One of the surviving defendants may properly move to dismiss, though suit has become abated by the death of another defendant. *Kelly v. Macklem*, 2 Cham. R., 132.

4. *Where claim satisfied.*

As to dismissing bill, where claim satisfied, see *McNab v. Morrison*, 2 Cham. R., 133.

5. *After the defendant has put in an insufficient affidavit on production.*

The fact that a defendant has put in an insufficient affidavit on production is no bar to his moving to dismiss. *Gillespie v. Gillespie*, 2 Cham. R., 267.

6. *By defendants recently added.*

Where a motion to dismiss was made by certain defendants, who had been made parties by amendment at a comparatively recent date, delay having occurred previously in the conduct of the cause, they were not permitted to shew such delay as a ground of dismissal, and an order to dismiss made by the Secretary, whose attention had not been called to the fact of the

parties moving having become parties at a recent period, was reversed, but with costs against the plaintiffs, they having been guilty of delay. *The Upper Canada Mining Company v. The Attorney-General*, 2 Cham. R., 207.

7. *Discretionary with Court or Judge.*

Where defendants had been dilatory in obeying the order to produce, and refused to go down to hearing by consent, when plaintiff, being too late to go down otherwise, applied for a consent, an order to dismiss was refused, and, under the same circumstances, an order to open publication, and for leave to set down cause for the following examination and hearing term, was granted. *Jeffs v. Orr*, 2 Cham. R., 273.

8. *Plaintiff let in after order to dismiss.*

When a plaintiff swears to a good case on the merits, the Court will, in its discretion, give him an opportunity to hear his case on the merits, even after an order to dismiss has been properly granted. *Rees v. The Attorney-General*, 2 Cham. R., 300.

9. *Where office copy not served.*

If a bill is filed, and no office copy served within the period limited for service (three months), the bill will, on application, be dismissed.

It is no answer to a motion to dismiss, under such circumstances, that the bill was filed previous to 1864, when the order limiting the time was passed. *Moore v. Roseburgh*, 2 Cham. R., 406.

10. *After decree.*

A bill cannot be dismissed, even by consent, after a decree has been made in the cause. *Ontario Bank v. Campbell*, 2 Cham. R., 458.

11. *Where refused.*

On a motion to dismiss the bill of a married woman, the

Court refused to count against her time which had been lost in consequence of an order obtained by the defendant requiring her to name a new next friend.

Where the defendant, having anticipated the time for answering, and an insufficient affidavit on production, was filed just in time to leave the plaintiff a single day before giving notice, supposing no amendments required, the Court refused a motion to dismiss. *Poole v. Poole*, 2 Cham. R., 475.

12. *Where delay through mistake of solicitor.*

A bill was filed by churchwardens, and, during the progress of the suit, the churchwardens were changed at the vestry meeting; the new churchwardens were not made parties. The suit not being brought to a hearing within the time required by the practice, it was *held* that a notice to dismiss the bill served on the plaintiffs' solicitor was regular. *Quære*, whether it was necessary to make the new churchwardens parties.

On a motion to dismiss, it appeared that the case had not been brought to a hearing through an error in judgment of the plaintiff's solicitor, *held* that it was proper to take into account such error in considering the application in connection with the other circumstances of the case. *McFeeters v. Dixon*, 3 Cham. R., 84.

13. *At the hearing.*

A cause having been brought on to be heard, it was found that a *pro confesso* note against one of the defendants had been waived by amending the bill, the plaintiff moved to dismiss the bill as against such defendant, without the dismissal being equivalent to a dismissal on the merits, and the Court granted the motion, and made a decree saving the rights of the defendants. *Waddell v. McGinty*, 15 Grant, 261.

14. *On further directions.*

On further directions, a bill was dismissed with costs as respected some of the original plaintiffs, they having no rights to sustain such a bill. *Gray v. Hatch*, 18 Grant, 72.

DISTILLERY.

See FIXTURES.

DISTRESS UNDER MORTGAGE.

See INJUNCTION.

DISTRIBUTION.

Period of.

See WILL, CONSTRUCTION OF

DISTRIBUTION OF DEPOSIT.

See FOREIGN FIRE INSURANCE CO.

DIVISION COURT.

On an interpleader in the Division Court, the jurisdiction of the Judge is not confined to the question of legal property; he may determine the claimant's right to an equitable interest. *McIntosh v. McIntosh*, 18 Grant, 58.

DIVISION OF LOSSES.

See PARTNERSHIP.

DORMANT EQUITIES.

The Statute 18 Vic., ch. 124, applies only to cases where the cause of suit arose before the passing of the Chancery Act (1837).

The locatee of lands of the Crown in 1824 contracted to sell a portion thereof, the consideration for which was paid, but he continued to hold possession of the lands until the year 1855, when the heirs of the bargainee filed a bill to enforce specific

performance of the contract, the patent from the Crown having been issued in 1830, the Court dismissed the bill with costs. *Silcox v. Gells*, 6 Grant, 237.

DOUBLE LIABILITY OF SHAREHOLDERS.

Bill to enforce. See PLEADING.

DOUBLE MAINTENANCE.

See WILL.

DOUBLE PROOF.

See INSOLVENCY.

DOUBTFUL EVIDENCE.

See QUIETING TITLE.

DOWER.

See SPECIFIC PERFORMANCE.

I. EQUITABLE DOWER.

II. SUBJECT TO EQUITABLE RIGHTS OF OTHERS.

III. GENERALLY, MISCELLANEOUS CASES RELATING TO

1. *Decree for.*
2. *Devise, free of, or subject to.*
3. *Receiver.*
4. *Election.*
5. *Arrears.*
6. *Timber cut.*
7. *Where improvements made.*
8. *Certificate of examination.*

IV. RELEASE OF, AND COMPENSATION FOR.

V. DEFICIENCY OF ASSETS.

VI. JURISDICTION TO ORDER SALE OF.

I. EQUITABLE DOWER.

The Act 4 William IV., chapter 1, giving dower out of equitable interests, applies as well where the parties were

married after, as where they were married before the passing of the Act.

A mortgage was created by an absolute conveyance with a separate defeazance, and the mortgagor having died, his heir effected an arrangement with the mortgagee who conveyed to the heir, and accepted from him a deed of a portion of the land in discharge of the mortgage debt. The heir afterwards sold to a party who had notice of the several conveyances. *Held*, that the widow of the mortgagor was entitled to dower in the portion so conveyed by the heir.

To a bill for equitable dower, the tenant in actual possession of the premises may be a proper, though not a necessary, party. *McIntosh v. Wood*, 15 Grant, 92.

A widow having by her conduct parted with her right to equitable dower, in favour of her son, a subsequent creditor of hers, was *held* not entitled to have her dower set out, and applied to pay his demand, though she was not aware of her right to dower at the time she was said to have parted with it. *Cottle v. McHardy*, 17 Grant, 342.

II. SUBJECT TO THE EQUITABLE INTERESTS OF OTHERS.

Where property was conveyed to a husband, under an agreement with the grantee that the grantor should be allowed to remain in possession for life of a specified portion: *Held*, that the widow of the grantee had no right to dower out of this portion during the life of the grantor; and an action by her therefor was restrained. *Slater v. Slater*, 17 Grant, 45.

A testator, while married, purchased the equity of redemption in certain lands, to which he afterwards died beneficially entitled. The widow claimed dower out of the whole property, both legal and equitable, and that the surplus money produced by a sale of the premises, after paying off the mortgage, being less than one-third of the whole sum for which the property sold, should be invested for her benefit as her dower; but there being creditors and specific or pecuniary legatees under the will of the testator, whose claims would more than exhaust the surplus:

Held, that the widow was only entitled to dower in the surplus money which represented the value of the equity of redemption. *Thorpe v. Richards*, 15 Grant, 403.

III. GENERALLY, MISCELLANEOUS CASES RELATING TO

1. *Decree for.*
2. *Devise, free of, or subject to.*
3. *Receiver.*
4. *Election.*
5. *Arrears.*
6. *Timber cut.*
7. *Where improvements made.*
8. *Certificate of examination.*

(1) *Decree for.*

The plaintiff claimed dower ; a decree was made less extensive than she claimed ; the Master made his report in pursuance of the decree ; the solicitor, on the same day, signed a consent to a decree on further directions being made in certain terms stated in the consent ; these terms were in accordance with the decree and report ; they provided also that, in lieu of dower, plaintiff should be paid a certain annual sum named ; the decree was not drawn up, but the agreement which it embodied was acted on for eight years. *Held*, that the plaintiff was bound by it, and that she could obtain no relief on the ground that the original decree should have been more favourable to her. *Sills v. Lang*, 17 Grant, 691.

III. (2) *Devise, free of, or subject to.*

A testator devised to his daughter for life a house and four acres of land ; and the will shewed that he contemplated that the devisee should reside on the property so devised : *Held*, that the testator had thereby sufficiently indicated his intention to devise free from his widow's dower ; and that the widow could not have dower in either this land or the other lands devised, without foregoing the provisions in her favour which the will contained. *Hutchinson v. Sargent*, 16 Grant, 78.

A testator by his will made certain gifts to his widow, not saying they were in lieu of dower. It was suggested that the

estate was not sufficient to answer these gifts in addition to the dower. *Held*, per SPRAGGE, V.C., that the other devisees were entitled to an inquiry as to this, and the weight to be attached to the circumstance would be considered after the result of the inquiry was ascertained. *Lapp v. Lapp*, 16 Grant, 159.

III. (3) *Receiver*.

A widow entitled to dower commenced an action therefor against a tenant, to whom, without express authority, the property had been leased by a receiver in this Court. *Held*, that she was not at liberty to proceed in such action without the leave of the Court. *Coleman v. Glanville*, 18 Grant, 42.

III. (4) *Election*.

A testator devised his farm to his widow for life, determinable upon her marrying again, and gave to her a certain portion of the dwelling-house situate thereon; and subject to this estate of the widow in the portion of the house, the will shewed an intention that the rest of the house and the farm should be kept in entirety, and be personally occupied and enjoyed by his sons until the youngest should attain the age of twenty-one. *Held*, that the widow must elect between the provision made for her by the will and dower. *Held*, also, that a second marriage, after having elected to take under the will, would not resuscitate the right to dower. *Ib*.

In such a case, the widow remained on the farm, and received some small sums of money for her own use, but had never had set apart for her exclusive enjoyment the portion of the house devised to her. *Held*, that these acts did not amount to that deliberate and well-considered choice made with a knowledge of rights, and in full view of consequences, which is necessary to constitute an election. *Ib*.

III. (5) *Arrears*.

Where the annual value of a widow's dower was not large, and she made no demand for it, but resided on the property with her son, the heir, during his life, she having no intention of

claiming dower, a claim for arrears against his estate, after his death, was refused. *Phillips v. Zimmerman*, 18 Grant, 224.

III. (6) *Timber cut.*

In case of land of which a widow is dowable, but in which her dower has not been set out, if the timber is cut down, she is entitled to the income arising from one-third of the amount produced. *Farley v. Starling*, 18 Grant, 378.

In such a case, the widow had reason to apprehend that the owner intended to fell the whole of the wood; it was shewn that, in fact, he had no such intention; but he had an opportunity of undeceiving her, and did not avail himself of it. *Held*, that proof that he had not the intention imputed to him, did not exempt him from liability to the costs. *Ib.*

III. (7) *Where improvements made.*

The mere fact that, at the death of, or alienation by, the husband, his lands were of no rentable value, is not alone sufficient to disentitle the widow to claim damages, if the land has been subsequently made rentable by reason of improvements, or otherwise, either by the heir or vendee; as, in such a case, a portion of the rent is attributable to the land. *Wallace v. Moore*, 18 Grant, 560.

III. (8) *Certificate of examination.*

Where a woman's right of dower is released by an instrument separate from the conveyance by her husband, an examination and certificate is still necessary, as before the late Statute. *Bogart v. Patterson*, 14 Grant, 624.

IV. RELEASE OF, AND COMPENSATION FOR.

The release of a wife's dower to a purchaser is a good consideration for the grant of a reasonable compensation to the wife; and such a grant made *bona fide* is valid against the husband's creditors. *Forrest v. Laycock*, 18 Grant, 611.

Where a wife joins in a mortgage of her husband's estate, as a security to the mortgagee, and for no other purpose, she parts

with her dower so far only as may be necessary for that purpose, and she is a necessary party to a subsequent sale by the husband free from dower. *Ib.*

Where a married woman had signed a deed, which, however, contained no bar of dower, the Secretary refused to direct a reference to inquire whether she intended thereby to bar her dower, though there were infant defendants who were interested in having the dower barred, such relief would be properly the subject of a bill. *Thompson v. Thompson*, 2 Cham. R., 211.

Where, after a husband's estate had been transferred to A., a purchaser, his wife executed a deed to A., containing a release of dower by her, but no words of release or conveyance by the husband: *Held*, sufficient to bar the wife without examination before Magistrates or a Judge. *Heward v. Scott*, 2 Cham. R., 274.

In case of a sale of land, a widow is not entitled, as compensation for her dower, to the present value of one-third of the interest in the purchase money; the value is to be computed with reference to the nature of the property. *Stewart v. Hunter*, 2 Cham. R., 336.

V. DEFICIENCY OF ASSETS.

Where a wife joined in a mortgage, and, on the death of the husband, there are not sufficient assets to pay all his debts, the widow is not entitled to have the mortgage debt paid in full out of the assets, to the prejudice of creditors. *White v. Bastedo*, 15 Grant. 546.

VI. JURISDICTION TO ORDER SALE (under *Consol. Stat. U. C.*, ch. 86, sec. 31).

The Court has jurisdiction in a suit, as well as on a petition, to decree a sale of an inchoate right of dower. *Cassey v. Cassey*, 15 Grant, 399.

EASEMENT.

See NUISANCE.

The use of bracket boards on a mill-dam is such an easement

as the Statute of Limitations will protect. *Campbell v. Young*, 18 Grant, 97.

Overflowing lands.

Under what circumstances, *held* that a purchaser had a right to overflow lands. *Boyle v. Arnold*, 16 Grant, 501.

ELECTION.

See DOWER, III. 4—WILL.

ELECTION LAW.

CONTROVERTED ELECTION ACTS.

Controverted Election Acts—Adjournment—Power of Judge to change place of hearing—Evidence of Bribery—Responsibility of Agents and Sub-Agents—Payment of Expenses of Voter—Treating—Destroying Election Accounts.

When a rule of Court had been granted, in pursuance of 34 Vic., cap. 3, sec. 14, appointing a place for the trial, not within the Division, the election for which is in question, the Judge by whom the petition is being tried has no power to adjourn for the further hearing of the cause from the place named in the rule of Court to a place within such Division.

When a charge of bribery is only the unaccepted offer of a bribe, the evidence must be more exact than that required to prove a bribe actually given or accepted.

The respondent entrusted about \$700 to an agent for election purposes, without having supervised the expenditure. *Held*, that this did not make him *personally* a party, within 34 Vic., cap. 3, sec. 46, to every illegal application of the money by the agent, or by those who received money from him. But if a very excessive sum had been so entrusted to the agent, the argument of a corrupt promise might have been reasonable.

When a candidate puts money into the hands of his agent, and exercises no supervision over the way in which the agent

is spending that money, but accredits and trusts him, and leaves him the power of spending the money, although he may have given directions that none of the money should be improperly spent, there is such an agency established that the candidate is liable to the fullest extent, not only for what that agent may do, but also for what all the people whom he employs may do.

The payment of a voter's expenses in going to the poll is intended as such, even though the payment may not have been intended as a bribe.

The distribution of liquor on the polling day, with the object of promoting the election of a candidate, will make his election void.

When all the accounts and records of an election are intentionally destroyed by the respondent's agent, even if the case be stripped of all other circumstances, the strongest conclusions will be drawn against the respondent, and every presumption will be made against the legality of the acts concealed by such conduct.

Where bribery by an agent is proved, costs follow the event, even though personal charges made against the respondent have not been proved, there having been no additional expense occasioned to the respondent by such personal charges. *Re Hunter, County of Grey (South Riding) Election Petition*, 8 U. C. L. J., 17, 4 Cham. R.

ENDORISING PAPERS.

An irregularity in the endorsement on pleadings of the name and place of abode of the solicitor filing the same is waived by demanding and receiving a copy of such pleading. *Bennett v O'Meara*, 2 Cham. R., 167.

Where the plaintiff's solicitor had been changed, and an order for such change served upon the defendant's solicitor, who had acted under such change by serving the new solicitor with notice of filing bond for security for costs of appeal; an objection that a proceeding subsequently taken was not endorsed with the

name and place of business of the new solicitor was overruled. *McDonell v. Mining Co.*, 2 Cham. R., 400.

Under General Orders 40 and 41, it is necessary that the names of the solicitors, and if agents, the names also of the principals for whom they act, should be endorsed on all the papers served in the suit; the provision in Order 41 only renders it unnecessary to endorse the "place of business" on subsequent papers after it has been endorsed on the first paper served. *Coates v. Edmonson*, 2 Cham. R., 439.

ENTAIL, BARRING.

Quieting Titles Act.

Whether a mortgage in the short form, under the Statute 27 and 28 Vic., ch. 31, executed by the tenant in tail, has the effect of barring the entail.—*Quære.* Re *Dolsen*, 4 Cham. R.,

ENTITLING PAPERS.

See AFFIDAVITS.

Where the affidavits on which an allowance of an appeal from a County Court Judge was sought, were not entitled in any Court, they were not allowed to be read. Re *Sharpe*, 2 Cham. R., 67.

EQUITABLE ASSIGNMENT.

See ASSIGNMENT, I.

EQUITABLE ESTATES.

The interest of a debtor in land, bought from the Crown, but for which, at the time of his death, he had not fully paid, and had not obtained the patent, is available in equity for the benefit of his creditors; and their right is not destroyed by a friend of the heirs paying the balance of the purchase money, and procuring the patent to issue in the names of the heirs. *Ferguson v. Ferguson*, 16 Grant, 309.

EQUITABLE DOWER.

See DOWER, I.

EQUITABLE PLEA.

Where a party had a clear right in regard to certain equities to set them up by way of equitable defence to an action at law, or to come to this Court; and, by mistake, pleaded them at law as a legal defence only, upon which he necessarily failed: *Held* [reversing the decree of V. C. Mowat], that this did not form any bar to relief, on the same grounds, in this Court. *Arnold v. Allinor*, 16 Grant, 213.

Where, in a suit at law, either party files an equitable pleading at any stage of the suit, and the judgment of the Court is given thereon, neither party will be allowed afterwards to file a bill in respect of the same matter, on the ground that the same had been insufficiently pleaded in the action at law. *Crabb v. Parsons*, 18 Grant, 674.

Accordingly, where the equitable pleading in question was by way of rebutter: *Held*, that the judgment at law was conclusive. *Ib.*

EQUITY OF REDEMPTION.

Compromise of Costs.

A suit for redemption having been compromised by payment into Court of a sum of money for the benefit of those entitled to the equity of redemption, a decree was made in a suit subsequently brought by an execution creditor of the mortgagor, directing an inquiry as to other incumbrancers, and payment to them according to priority, and the defendants having made no improper defence, were *held* entitled to receive their costs out of the fund. *Robertson v. Beamish*, 16 Grant, 676.

ESPLANADE ACTS.

Under the Acts relating to the construction of the Esplanade

in the City of Toronto, water lot owners are not entitled to be paid the cost of constructing so much thereof as the owners shall have constructed. *The City of Toronto v. Mowat*, 16 Grant, 355.

Arbitration.

Arbitrators appointed to determine the amount to be paid between the city and the water lot owner, in respect of the construction of the Esplanade, in setting a value on the water lot, did so as at the time of the grant; and awarded interest in respect of the sum found payable by the owner to the city. The award was set aside on both grounds, as the arbitrators should have valued the lot as at the time it was taken possession of by the city, and the Statutes give them no power to award interest, which is chargeable only from the time of the registration of the Surveyor's certificate, or the making of the award.

In proceeding under the Acts, whether there should not be separate findings or awards in respect of the filling in of the Esplanade, and the grading, levelling, &c., of the strip to the north of it.—*Quære. Brooke v. The City of Toronto*, 14 Grant, 258.

ESTATE TAIL.

See WILL, CONSTRUCTION OF.

ESTOPPEL.

See FRAUD ON CREDITORS—RECTOR.

EVIDENCE.

Parol evidence to vary writing, &c. See AFFIDAVITS—EXAMINATION—MORTGAGE, V.

Of alteration in Deed. See DEED, VI.

Of Marriage. See ALIMONY, I. 4.

GENERALLY.

1. *Of title.*
2. *By affidavit.*
3. *After hearing.*
4. *Of a Mortgagor.*
5. *Of a party deceived.*
6. *Of one defendant against another.*
7. *Ancient deed.*
8. *Handwriting of a deceased witness.*
9. *New trial before a Jury.*
10. *To contradict.*
11. *Of whether mortgage money paid.*
12. *Parol.*
13. *Of bona fides.*

GENERALLY.

1. *Of title.*

On the investigation of title between vendor and vendee, under the ordinary jurisdiction of the Court, it is not usually necessary to prove the execution of deeds produced. *Brady v. Walls*, 17 Grant, 699.

2. *By affidavit.*

Affidavits are admissible for some purposes on such an investigation ; where, however, an affidavit was offered to prove the loss of a will, which had been proved in a Surrogate Court in New York, but had never been registered or proved in Ontario, and there was some reason for apprehending that there existed no legal means of proof of the will by the purchaser, should he be compelled to accept the title, the affidavit was held insufficient evidence. *Ib.*

3. *After hearing.*

Where, after the evidence at the hearing of a cause was closed on both sides, the Court ordered the cause to stand over to add a party, further evidence between the original parties was held to be inadmissible at the adjourned hearing. *The*

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Attorney-General v. The Toronto Street Railway Company, 15 Grant, 187.

An application to take evidence after hearing should be by petition and in Court, and an application made in Chambers was dismissed with costs. *Nicholl v. Moore*, 2 Cham. R., 474.

4. *Of a Mortgagor.*

In a suit by the assignee of a mortgage, brought against the mortgagors (who had covenanted with the assignee that the whole mortgage money was due), one of the mortgagors is not a competent witness to prove a payment to the mortgagee in his lifetime. *Hancock v. McIlroy*, 18 Grant, 209.

5. *Of a party deceived.*

In a case where there was a conflict as to what had passed in conversations, and no other witnesses of them were produced, it was held, that, other things being equal, the version of the deceived party should be accepted in preference to that of the other party. *Wright v. Rankin*, 18 Grant, 625.

6. *By one defendant against another.*

At the hearing of a cause, evidence is not admissible by one defendant against another. *The Attorney-General v. Street Railway Company*, 15 Grant, 187.

7. *Ancient deed.*

Although the rule is, that an ancient deed, produced from the proper custody, proves itself, this does not preclude a party interested from proving that the deed was a forgery; or that, on any other ground, this deed is not a valid and binding instrument. *Chamberlain v. Torrance*, 14 Grant, 181.

8. *Handwriting of a deceased witness.*

Where a party supporting a deed proves the handwriting of a deceased witness, in order to raise the presumption of due execution, the other party may give evidence of the character of such deceased witness as corroborative of evidence tending to shew that the deed was a forgery concocted by him. *Id.*

9. *Next trial before a Jury.*

A trial was ordered before a Jury to try the question as to the genuineness of a deed more than thirty years old, produced by one of the parties, when evidence was adduced which was a surprise upon the defendants. The Court, at their instance, ordered a new trial or re-hearing of the cause upon payment of costs of the hearing already had, including the costs occasioned by a Jury being summoned and empannelled, as also the costs of the motion; and defendants undertaking to pay the costs of the second Jury, should they demand one, whatever might be the result of the cause. *Ib.*

10. *To contradict.*

A person having a paper title to land, of which he was not the actual owner, created a mortgage thereon, to a person not a party to a suit, by the party beneficially interested, to get rid of another mortgage created on the estate, was asked if he had given notice of the claim of the real owner at the time of the alleged execution of the first mortgage, which he asserted he had given, and also denied having made such mortgage; evidence was called to contradict him. *Held*, that this could not be deemed a collateral issue, and, therefore, such evidence was admissible. *Gray v. Couch*, 15 Grant, 419.

11. *Of whether mortgage money paid.*

In a suit for the recovery of mortgage money, the question between the parties was, whether the mortgage money had been paid, both parties offered evidence at the hearing, and the Court received the same, and adjudged thereon. *Bacon v. Shier*, 16 Grant, 485.

12. *Parol evidence.*

Parol evidence to establish trusts not shewn upon a conveyance absolute in form is inadmissible. *Langstaff v. Playter*, 8 Grant, 39.

See SPECIFIC PERFORMANCE.

13. *Of bona fides.*

In the case of sale by an insolvent person to a relative, attended by suspicious circumstances, the reality and *bona fides* of the transaction should not be rested on the uncorroborated testimony of the parties to the impeached transaction. *The Merchants' Bank v. Clarke*, 18 Grant, 594.

EXAMINATION.

See SCANDAL.

I. EXAMINING PARTIES.

- II. " A HUSBAND OR WIFE.
- III. " DE BENE ESSE.

I. EXAMINING PARTIES.

The Court will take into consideration the fact that parties can be more efficiently examined in Toronto than in some outer counties, and will not consider alone the balance of convenience of the parties or solicitors attending.

An application to change the examination from Stratford to Toronto was granted, although no great difference was shewn as to the convenience of the parties interested, on the suggestion (without affidavits) that the examination could be more efficiently and expeditiously conducted in Toronto. *Kahn v. Redford*, 3 Cham. R., 55.

[*Note*.—This case is misreported. The application, under the circumstances, was refused; but it is understood that the fact that a witness or party can be more efficiently examined in Toronto will weigh with the Court or Judge on a motion to change the place of examination.]

An application for an order for the defendant to attend at his own expense, and be examined on his answer, may be made *ex parte*. *Harrison v. Greer*, 2 Cham. R., 438.

The examination of a defendant under the General Order 138 is the substitute for discovery by interrogatories, and to entitle a plaintiff to examine on any particular subject, he must make a case for it in his bill.

Where a defendant refused to answer questions not founded on any case or charge or allegation made in the bill, an application to compel him to attend and answer was refused with costs. *Dickson v. Covert*, 2 Cham. R., 342.

Where a defendant has been examined on his answer; the answer and examination may be read in connection and used as an affidavit in support of a motion for decree. *Mathers v. Short*, 14 Grant. 254.

Compelling attendance of a party out of jurisdiction for the purpose of being examined.

A plaintiff, desirous of obtaining the evidence of a defendant who resided out of the jurisdiction and could not be served personally, paid a sufficient sum to the defendant's solicitor for conduct money, and moved for substitutional service of a subpoena on the solicitors, and that if default was made in attending, the bill might be taken *pro confesso*. The application was refused with costs. *Sefton v. Lundy*, 4 Cham. R., 33.

Where a defendant lived at Hamilton, and the bill was filed at Toronto, plaintiff took out an appointment to cross-examine, the defendant before the Deputy Master at Goderich, the appointment was set aside with costs. *McDermid v. McDermid*, 2 Cham, R. 372.

Discovery.

A party making affidavit for the purpose of moving to change the venue, and stating that certain parties are material and necessary witnesses, is not bound on cross-examination to state what evidence he expects from such witnesses, or to state facts tending to test the materiality of the proposed evidence. *Crombie v. Bell*, 3 Cham. R., 195.

II. A HUSBAND OR WIFE DEFENDANT ON ANSWER.

A husband is liable to cross-examination on his answer to a bill filed by his wife against him. *Patterson v. Kennedy*, 2 Cham. R., 372.

As a rule, a suitor has not a right to bring his opponent to

Toronto, or elsewhere from his residence, for the purpose of interlocutory examination, except upon special grounds.

Where, therefore, an order had been made by the Secretary for a plaintiff to attend before a special examiner at Toronto, the venue of the case being laid at Goderich, and the parties residing there, and the plaintiff's solicitor residing there also, the solicitor for the examining defendant residing in Toronto; such order was rescinded upon the plaintiff refunding the conduct money paid him, without costs, the defendant being held to have acted in accordance with what appeared to have been very generally understood in Toronto as the right of examining parties.

The proper practice in a case where special grounds exist, is an application on notice in Chambers shewing such special grounds. *Gallagher v. Gairdner*, 2 Cham. R., 480.

III. DE BENE ESSE.

Order made *ex parte*. *Oliver v. Dickey*, 2 Cham. R., 87.

An order to examine a witness *de bene esse* will be granted on an *ex parte* motion. *Crippen v. Ogilvie*, 2 Cham. R., 304.

On applying for an order to examine a witness *de bene esse*, it should be clearly shewn that the witness is the only witness as to the fact sought to be proved by him. An application, supported by an affidavit of the solicitor as to his belief, was refused. *Jameson v. Jones*, 3 Cham. R., 98.

EXECUTION.

See EQUITABLE DOWER—INJUNCTION, I.—EQUITABLE ESTATE.

Where a suit is brought for equitable execution against lands, in aid of a judgment at law, the bill must shew that an execution at law had been placed in the hands of the Sheriff. *Shea v. Denison*, 14 Grant, 513.

Inception of.

A *fi. fa.* against lands was returnable on the 15th September,

1863, the advertisement for sale was first published after that date, while the writ was current; the Sheriff had told the defendant that he had the execution, and that the land would be sold unless he paid; the Sheriff was also on the lands more than once before the writ expired; but he did not go to make a seizure.

Held, that there had been no inception of the execution during its currency. *Bradburn v. Hall*, 16 Grant. 518.

Equitable Execution. See EQUITABLE ESTATE.

Equitable interests cannot be reached by an execution creditor unless he commences a suit or takes some other step for the purpose during the currency of the writ. *Wilson v. Proudfoot*, 15 Grant. 103.

EXECUTION CREDITOR.

See ADMINISTRATION SUIT.

Costs of. See ADMINISTRATION SUIT—COSTS. See also MORTGAGE—WILL—EXECUTION—EQUITABLE ESTATES.

EXECUTORS.

See ADMINISTRATOR—HUSBAND AND WIFE—WILL—MORTGAGE, II. 3.

I. DUTIES, LIABILITIES, AND POWERS OF.

1. *Married Woman's Act—Authority to Executor.*
2. *Duties of Executors as to realizing assets.*
3. *Where money said to be burnt.*
4. *Paying Solicitor's bill.*
5. *Where Heir infant.*
6. *Where powers cease on the happening of a contingency.*
7. *Right of retainer—Statute of Limitations.*
8. *Powers to accept land in payment.*
9. *Interest.*
10. *Where charged with loss.*

II. COMPENSATION TO.

1. *Allowance by Surrogate Judge.*
2. *Scale of.*
3. *By commission.*

III. IMPROVEMENTS BY.

IV. FI. FA. AGAINST BEFORE PROBATE.

V. AWARD BETWEEN.

VI. DE SON TORT.

I. DUTIES, LIABILITIES, AND POWERS OF.

1. *Married Woman's Act—Authority to Executor.*
2. *Duties of Executors as to realizing Assets.*
3. *Where money said to be burnt.*
4. *Paying Solicitor's Bill.*
5. *Where Heir infant.*
6. *Where powers cease on the happening of a Contingency.*
7. *Right of Retainer. Statute of Limitations.*
8. *Power to accept land in payment.*
9. *Interest.*
10. *Where charged with Loss.*

I. (1.) *Married Woman's Act—Authority to Executor.*

Under the Married Woman's Act, a *femme coverte* was held competent to bind her interest as residuary legatee by her written authority to executors, given and acted upon in good faith, to accept land in satisfaction of a debt due to the estate, without evidence of the husband's having concurred in giving the authority. *McCargar vs. McKinnon*, 15 Grant, 361.

I. (2.) *Duties of Executors as to realizing Assets.*

Executors should proceed with promptitude to realize the assets of the estate; and the law presumes that as a general rule a year should be sufficient for this purpose. They should exercise a reasonable discretion, as to suing the debtors of the estate, and should procure evidence of having done so in the case of uncollected debts, the onus of proof being on them and not on the legatees. But where the result proves unfortunate they are not charged with the loss, though the Court should not con-

cur in the propriety of the course which in the *bona fide* exercise of their discretion they took. A delay of ten months which resulted in the loss of a debt, was held to require explanation.—*McCargar, v. McKinnon*, 15 Grant. 361.

I. (3) *Where money said to be burnt.*

Where an executor alleged that he had kept money belonging to the estate for several years in his house, until the same was destroyed by fire and the money lost; the Court held the executor guilty of a breach of trust with respect to the money, and his affidavit as to the destruction being unsatisfactory, refused to discharge him from custody under a writ of arrest.—*Lawson v. Crookshank*, 2 Cham. R. 426.

I. (4) *Paying Solicitor's Bill.*

Where an executor has in good faith paid his solicitor's bill of expenses incurred in administering the estate, the Master may, without taxing the bill, moderate it by deducting charges which appear not to be proper.

In considering whether evidence is sufficient to relieve an executor, as between him and legatees, in respect of uncollected debts of the testator, the lapse of time in connection with the smallness of the debt is proper to be taken into account.—*McCargar v. McKinnon*, 17 Grant, 525.

I. (5) *Where Heir Infant.*

Where an execution is issued against the lands of a deceased person in the hands of his executors, and the heir is an infant, or is not competent to look after his own interests, or is not aware of the proceedings, it is the duty of the executors to act in the matter of the sale as a prudent owner would. In *Re Thomas Davis*, 17 Grant, 603.

I. (6) *Where powers cease on the happening of a contingency.*

Where an executor is appointed for a limited period or until the happening of some event, his power as such executor ceases with the occurrence of such contemplated event.

A testator by his will appointed his wife executrix, and gave her certain legacies, provided she remained single, and in the event of her marrying again, made other disposition of his estate, and appointed another person his executor. An assignment of a mortgage made by her and her husband after her second marriage was held to pass no interest. *Conron v. Clarkson*, 3 Cham. R., 368.

I. (7) *Right of Retainer—Statute of Limitations.*

Where an executor of a creditor is also administrator or executor of such creditor's debtor, the right of retainer arises when there are any assets, and he will be assumed to have exercised such right without any actual act of appropriation being established, and though his claim would otherwise be barred by the Statute of Limitations.

The right of retainer out of legal assets applies to *equitable* as well as to *legal* debts, especially in a case where there is no competition of creditors. *Kline v. Kline*, 3 Cham. R., 161.

I. (8) *Power to Accept Land in Payment.*

Executors have power, in the exercise of a prudent discretion, to accept land in payment of an execution debt. *McCargar v. McKinnon*, 17 Grant, 525.

I. (9) *Interest.*

Executors and trustees may be charged with interest as well as principal, in respect of sums lost through their misconduct, though the principal never reached their hands. *Sovereign v. Sovereign*, 15 Grant, 559.

I. (10) *Where charged with Loss.*

Where an executor saw the estate wasted from time to time by his co-executrix and an agent she had appointed, and took no steps to prevent the same, he was charged with the loss. *Ib.*

II. COMPENSATION.

1. *Allowance by Surrogate Judge.*
2. *Scale of.*
3. *Commission.*

II. (1) *Compensation to—Allowance by Surrogate Court Judge.*

Where, an executor pending an account before the Master, obtained an order from the Surrogate Judge, allowing him compensation, and the Master allowed the amount of compensation mentioned therein, without exercising his own judgment as to its propriety or reasonableness; an appeal, on that ground from the report of the Master by the creditors of the estate, was allowed, and the executor ordered to pay the costs thereof. *Biggar v. Dickson*, 15 Grant. 233.

II. (2) *Compensation, scale of.*

Where, the amounts received and expended by the executors were large and it did not appear that there was any special difficulty or trouble in the management of the estate, and the Master had allowed the executors a commission of five per cent. on all moneys received and expended by them, and half that amount on the moneys received, but not expended, an appeal from the Master's report on the ground of excessive allowance was allowed. *Thompson v. Freeman*, 15 Grant. 384.

II. (3) *By Commission.*

A testator authorized his executors in their discretion to continue the business of lumberer, miller, and merchant, which he had been carrying on, and which they elected to do, and carried on such business for some years, through an Agent, one of the executors visiting the place occasionally to supervise the business generally. *Held*, that a commission on the moneys received from this source, was not a proper mode of compensating the executors, but that they were entitled to be compensated therefor; and that not illiberally. *Thompson v. Freeman*, 15 Grant, 384.

III. IMPROVEMENTS BY.

An executrix who had an annuity charged on the income of the testator's estate, real and personal, expended money, in good faith, in improving the real estate in other unauthorized ways, and was in consequence, found largely indebted to the estate.

Held, that the expenditure in improvements should be allowed in reduction of her indebtedness, so far as the expenditure had enhanced the value of the estate and benefited those interested in it.

Where an executrix, jointly with one or more of those entitled to the testator's estate, and during the minority of others of them, contracted for the sale of portions of the real estate, and the purchasers made improvements, the Court refused to disturb the possession of the purchasers before the time had arrived for the partitioning of the estate, and charged them meanwhile with a ground rent only, and not with the improved value. *Morley v. Matthews*, 14 Grant, 551.

IV. FI. FA. AGAINST EXECUTOR BEFORE PROBATE.

The title of an executor being derived from the will, and not from the probate, the Court refused to restrain execution against the lands of a deceased debtor on a judgment recovered against the executor before probate. *Stump v. Bradley*. 15 Grant, 30.

V. AWARD BETWEEN EXECUTOR AND CO-EXECUTOR.

One of the several executors being indebted to the estate, the matter was left by himself and his co-executor to arbitration, and the arbitrators awarded a large sum against him. *Held*, that though the award might not be binding on the persons beneficially interested in the estate, it was binding on the executor, as he had chosen to submit the matter to the arbitrators, and in a suit by the executors he was decreed to pay the amount. *Koella v. McKenzie*, 15 Grant, 331.

VI. DE SON TORT. See COSTS.

EXECUTORY DEVISE OVER.

See WILL.

EXCHANGE.

See SPECIFIC PERFORMANCE, 4.

EXONERATION.

See MORTGAGE, &c.

EX PARTE MOTIONS.

See EXAMINING DEFENDANT.

The Court will not grant an order on an *ex parte* application unless the practice distinctly authorizes it.

On such an application for payment out of redemption money in Court, the application was refused. *Totten v. McIntyre*, 2 Cham. R., 462.

The Court does not favour the granting of *ex parte* orders, except in cases where the practice clearly authorizes them.

An application to compel the defendant's solicitor to deliver an office-copy of the answer was refused, because made *ex parte*. *Stewart v. Richardson*, 2 Cham. R., 443.

An *ex parte* order will not be set aside because it is not entered. *McEwan v. Orde*, 2 Cham. R., 278.

EXTENDING TIME FOR APPEALING.

See APPEALING.

EXTENDING TIME FOR PAYMENT OF MORTGAGE MONEY.

I. WHERE GRANTED.

II. WHERE REFUSED.

I. WHERE GRANTED.

A Judge in Chambers, though not as a matter of right, extended the time for the payment of mortgage money where the money was for purchase money, and the vendor had made a prior mortgage on the property which he had not paid off according to his covenant for title, and it appeared that the

existence of the first mortgage prevented the plaintiff from raising money to pay off the second. *Gould v. VanKoughnet*, 2 Cham. R., 33.

Where the plaintiff can be replaced in the same position as he occupied before default, and recompensed for any damage he may have suffered, and there appears a prospect of the amount of the mortgage money being paid within the period asked for, the Court will not refuse to open the foreclosure. *Waddell v. McColl*, 2 Cham. R., 62.

Six months further time was given for payment of the mortgage money, on an application made the day before the mortgage was due, when it was shewn that the property would be greatly enhanced in value in the meantime by the construction of a contemplated railway, on payment of interest on principal and interest due, and the costs of the application. *Cameron v. Cameron*, 2 Cham. R., 375.

Where the day to pay money reported due on a mortgage was past, the Court allowed the mortgagor six months further time to redeem, on condition of paying the costs of the motion and interest on the whole sum found due, it appearing that the security was good, and the mortgagor in a fair way to raise the money. *Street v. O'Reilly*, 2 Cham. R., 270.

The time for payment of mortgage money was extended, where it was shewn that the defendant was hampered and hindered in selling or raising money on lands in consequence of an advertisement signed and circulated by the plaintiff's solicitors. Under the above circumstances the motion was granted without costs to the plaintiff. *Gilmore v. Myers*, 2 Cham. R., 179.

An extension of time for payment of money appears to be granted only in cases where a forfeiture would result from its nonpayment. *Lawson v. Crookshank*, 2 Cham. R., 373.

Where delay was shown on the mortgagor's part, but he showed a reasonable prospect of being able to pay in a few months, the principal and interest were ordered to be capitalized and interest on the whole paid, and the costs of the application paid in a week. *Cahuac v. Durie*, 2 Cham. R., 394.

II. WHERE REFUSED.

Where through the default of the defendant in the payment of his mortgage, the plaintiff had had to raise money on security of the land, and a very considerable delay had taken place before the application was made and a final order of foreclosure had issued; the Secretary refused to set aside the order and extend the time for payment. *Waddle v. McColl*, 2 Cham. R., 58.

FAMILY ARRANGEMENT.

See EQUITABLE DOWER.

FATHER AND SON.

See DEED—FRAUD—SPECIFIC PERFORMANCE—UNDUE INFLUENCE—GIFTS.

A son who had purchased property for his father, and had taken the conveyance in his own name, afterwards induced his father while in a state of mental depression, to enter into a contract that the son should retain the property on certain terms which were hard and unfavourable to the father:

Held, that the contract was not valid in equity, and that the father was entitled to a conveyance, on payment of the sum which the son had paid on the contract. *Johnston v. Johnston*, 17 Grant, 493.

FERRY.

Ferry Between Provinces of Ontario and Quebec—License of.

The Crown has a right to grant a license of Ferry across the Ottawa, between the Provinces of Ontario and Quebec, free from the restrictions contained in the Consolidated Statute of Upper Canada, chapter 46, that Statute not applying to such a case. *Smith v. Ratte* (In Appeal), 15 Grant, 473.

FINAL ORDER.

See FORECLOSURE.

FL. FA.

Return of, pending suit, and effect as to lands fraudulently conveyed. See DEED, IV.—COSTS—EXECUTION, IV.—EQUITABLE ESTATE.

FIRE INSURANCE.

See also INSURANCE—PRINCIPAL AND AGENT.

A fire policy in favour of a mortgagor, contained a clause providing that in the event of loss under the policy, the amount the assured might be entitled to receive, should be paid to *A. L.*, mortgagee :

Held, by the Court of Appeal, that this clause did not make *A. L.* the assured, and that a subsequent breach by the mortgagor of the conditions of the policy made it void as respected *A. L.* as well as himself. [SPRAGGE, V. C., dissenting.] *Livingstone v. The Western Insurance Company*, 16 Grant, 9.

FIXTURES.

See LANDLORD AND TENANT.

1. On the death of the owner of a distillery, the still goes to the heir or devisee with the realty. *McLaren v. Coombs*, 16 Grant, 587.

2. The widow professed to sell the property, but had no authority to do so, under the will, except for her own life ; the purchaser removed the still, sold it, and put in a new one. Finding after the widow's death, that his title was defective, he removed the still, and it was *held*, that the devisee was not entitled to have the new still restored, but was entitled to the value of the old still. *Ib.*

3. On the sale of a woollen factory and machinery, it was stipulated that until the purchase-money should be fully paid,

the vendees were not to remove the machinery. The vendors afterwards executed a conveyance to the purchasers, and the latter, to secure the unpaid purchase-money, executed a mortgage which purported to be of the factory only, and did not mention the machinery :

Held, that the covenant against removing the machinery, remained in force :

Held, also, that the mortgage covered not only the machinery which were fastened with nails or screws, but also machines which were kept in their place by cleats, as well as the plates and paper used with the press. *Crawford v. Findlay*, 18 Grant, 51.

4. The purchasers re-sold, their vendee having notice of the covenant, and the vendee subsequently became insolvent :

Held, that his assignee in insolvency was not at liberty to remove the machinery by reason of non-registration under the Chattel Mortgage Act or otherwise. *Id.*

FLUCTUATION IN VALUE OF LAND.

See TIME, ESSENCE OF CONTRACT.

FORECLOSURE AND OPENING FORECLOSURE.

See MORTGAGE—PRACTICE.

Miscellaneous cases shewing circumstances under which Court or Judge will open Foreclosure or set aside final order.

1. A purchaser from a party in whose favour the Court has decreed final foreclosure, has a right to presume that the Court has taken the necessary steps to investigate the right of the parties, and has, on that investigation, properly decreed foreclosure.

The Court will not set aside a foreclosure after the estate has been acquired by a *bona fide* purchaser for value on account of a slight irregularity in one of the papers on which the order

for foreclosure was granted. Where, therefore, a party who was a second mortgagee and had been solicitor for the plaintiff, purchased the estate from one who had, for aught that appeared, purchased in good faith for value of the plaintiff, without notice of any irregularity, and the order for foreclosure was set aside by the Secretary on account of the absence of a date in the bank manager's certificate; an application by the purchaser from the plaintiff, in which the subsequent purchaser joined, to set aside the Secretary's order was granted with costs.

It was held that the joining in such application by the subsequent purchaser, was not irregular but surplusage at most.

The defendant having, as it was alleged, sold his interest or equity of redemption to a third party, who was notified of this application, it was held that it was not necessary to notify the defendant, as the purchaser from him had been notified. *Collins v. Denison*, 2 Cham. R., 465.

2. In a foreclosure suit, the mortgagor being dead, one of his heirs-at-law, who was originally a defendant, appeared from the affidavit filed to obtain service by publication to be dead, and the bill was thereupon amended by striking him out. The foreclosure was completed as against the other defendants, and after decree (on some objection to the title, by an intended purchaser, arising) a petition was filed by the plaintiff praying for an order foreclosing such party, and another party to whom one of the female defendants had been married and parted from, some fifteen years previously, and who had not since been heard of. The Referee refused the application *Street v. Dolan*, 3 Cham. R. 227.

3. A defendant seeking to open foreclosure should shew some reasonable excuse for not redeeming at the proper time, also, that he has a prospect of paying the mortgage debt if time be given him, and that the property is of much greater value than the amount due. *Johnson v. Ashbridge*, 2 Cham. R., 251.

4. The Court will not interfere to open foreclosure in aid of a defendant who has been guilty of laches, and shews no efforts

made on his part to avoid foreclosure or save his estate. *Brothers v. Lloyd*, 2 Cham. R., 119.

5. Suing at law for part of the mortgage money, for which the note of a third party had been given as collateral security, will not open the foreclosure if such suit is brought before foreclosure completed.

On a motion for delivery of possession, the Court will not as a general rule look behind the final order for foreclosure. *Mills v. Choate*, 2 Cham. R., 374.

6. The recovery of a judgment against the defendant after a final order of foreclosure, has the effect of opening the foreclosure and letting the defendant in to redeem.

In such a case the Secretary made an order giving time for redeeming, that part of the order being acquiesced in ; putting the defendant on terms to pay subsequent interest and costs, and that writ of assistance issue without further order if default made in payment at time named. *Mills v. Choate*, 2 Cham. R., 433.

7. Where a purchaser of the equity of redemption paid amounts found due to plaintiff, it was held that this was a payment by defendant, or some one on his account, and the final order of foreclosure was set aside. *Reid v. Cooper*, 2 Cham. R., 90.

8. *L.* and *S.* were joint owners of certain lands, and *L.* had created a mortgage on a part of his undivided interest, in favour of *R.* With a view of effecting a partition, *L.* conveyed his interest to his co-tenant *S.* who thereupon re-conveyed to *L.* a certain defined portion ; and in order to protect *S.* against the mortgage outstanding in *R.*'s hand, *L.* executed back to *S.* an indemnity mortgage : *L.* did not pay off *R.*'s mortgage ; and *L.* having obtained a final decree of foreclosure sold his interest in the property to *S.* *L.* after the partition, had sold a portion of the estate to the plaintiffs who in respect of their interest had been made parties to the foreclosure suit by *R.* Subsequently, in an action of ejectment *L.* set up a title under the indemnity mortgage from *L.*

Held that he had thus let in the plaintiffs to redeem who were entitled to do so upon paying what *S.* had paid or was liable to pay to *R.*, and all expenses reasonably incurred, together with costs as of an ordinary redemption suit—beyond those, *S.* was ordered to pay the costs. *Read v. Smith*, 14 Grant, 250.

FOREIGN ADMINISTRATION.

See ADMINISTRATION.

FOREIGN FIRE INSURANCE CO.

1. The deposit required to be made by Foreign Insurance Companies is intended for the security of Canadian policy-holders; and on the insolvency of any such Company the general creditors of the Company are not entitled to share the deposit with the policy-holders. In re *The Aetna Insurance Co. of Dublin*, 17 Grant, 160.

2. In case of a deficiency of assets, the costs of creditors proving claims are to be added to the debts, and paid proportionately, and are not entitled to be paid in priority to the debts.—*Id.*

FRAUD, AND THEREIN OF FRAUDULENT CONVEYANCES.

Fraudulent Judgment. See JUDGMENT CREDITOR. And see also *passim* ASSIGNMENT—MORTGAGE—TRUSTS—PURCHASER—HUSBAND AND WIFE—FATHER AND SON—GIFT—JUDGMENT CREDITOR—PRINCIPAL AND AGENT.

FRAUDULENT CONVEYANCES TO DEFEAT OR DELAY CREDITORS, AND CONVEYANCES BETWEEN PARTIES IN A FIDUCIARY CHARACTER.

A took a conveyance as trustee for *B.* *B* in answer to a bill by a person who claimed the property against both, was induced by *A* to swear that he *B* had not any interest in the pro-

party : *Held*, in a subsequent suit by *B*, against *A*, that he (*B*) was not precluded from shewing the trust. *Washburn v. Ferris*, In Appeal, 16 Grant, 76. Reported in Court below, 14 Grant, 516.

A person indebted to his housekeeper in \$600, conveyed to her some land in satisfaction of the debt, the consideration being not inadequate. On a bill by another creditor, to set aside the conveyance as fraudulent and void, the Court being satisfied that the debt was owing, and that the conveyance was intended to be effectual, *held* the conveyance valid and dismissed the bill; but, under the circumstances, without costs.—*Moore v. Davis*, 16 Grant, 224.

H being indebted to *R*, and both being in pecuniary difficulties, *H* made an absolute conveyance of his land to *R*, which was intended to secure the debt due to *R*, but was made absolute in form to deceive *H*'s creditors : various subsequent dealings with the property took place with a view of deceiving the creditors of both parties ; and by means thereof the interest of *H* and *R*, if any, appeared to be respectively a mere money charge on the property at the time *fi. fas.* against their lands were given to the sheriff : but *held*, that the writs bound their respective interests, and that they should be sold in equity to pay the execution debts.—*Brock v. Saul*, 16 Grant, 589.

A married woman, owner of real estate, representing herself as a spinster, is not entitled in equity to set up that the sale was void because of a conveyance not having been executed in conformity with the statutes as to the conveyances of land by married women.—*Graham v. Meneilly*, 16 Grant, 661.

The owner of land, who had become utterly abandoned to drunkenness, created a mortgage thereon for about one-fourth of its value ; and within a year afterwards the mortgagee obtained from him an absolute conveyance of the land, for a very trifling, if any, further consideration than the mortgage debt, in which conveyance his wife joined to bar her dower, and the same was executed by the husband and wife in the presence of their son. The evidence showed that the grantor from his hab-

its had become incapable of properly understanding business transactions.

The Court under the circumstances, although after great delay in taking proceedings, gave him relief against the deed, although in the meantime three of the persons present at the execution thereof—one of them the son of the grantor—had died; the Court assuming for the purposes of the decision that the parties other than the son, would have testified to their belief in the sobriety and intelligence of the grantor.—*Crippen v. Ogilvie*, 15 Grant, 490.

Delaying Creditor. Stat. 13 Elizabeth.

A debtor sold his property, reserving by parol certain future rents to pay a creditor, and which were sufficient for the purpose; the object was to delay the creditor and to compel him to wait for payment until these rents should accrue and all parties combined for that object. The sale was held wholly void against the creditor—a transaction to delay a creditor being within the Statute 13th Elizabeth, as much as a transaction to defeat him altogether.—*Murtha v. McKenna*, 14 Grant, 59.

Insolvent. Inadequate consideration.

Where an insolvent person who was pressed by his creditors and contemplated leaving the country in consequence of his embarrassments, made a conveyance of all his tangible property for an inadequate consideration to a relative who was aware of his circumstances; the conveyance was set aside against creditors.—*Crawford v. Meldrum*, 3 E. & A., 101.

Fraud on Creditors.

An insolvent person executed to his son, a mortgage for \$1000, of which \$400 was a pretended debt to his mother. The son subsequently, under an arrangement with the father, transferred the mortgage to C, who was the holder of the notes to the mortgagor, to the amount of \$600, which he gave up to the mortgagee, and he paid in cash \$400 to the mortgagee. C had notice of the character of the mortgage, but the transaction with him was *bona fide*.

Held, on appeal, that he was entitled to claim for the full amount of the security in priority to subsequent execution creditors of the mortgagor. (Mowat, V. C., dissenting.) Overruling case in Court below ; Reported, 16 Grant, 243. *Totten v. Douglass*, 18 Grant, 341.

A sale which is made with intent, on the part of both vendor and vendee, to defeat the creditors of the former is void in equity, whether the sale was or was not intended to take effect as between the parties to it.—*Wood v. Irwin*, 16 Grant, 398.

In a suit by a creditor to set aside a deed on the ground (amongst other things) that it was made to the defendant on a secret trust for the grantor and to defeat his creditors, it was *held*, that the grantor's statements after the conveyance that it was a real transaction, were admissible evidence for the defendant, but were not entitled to much weight.—*Ib.*

A conveyance executed by a debtor in satisfaction of or security for a debt, if intended to operate between the parties, is valid, though obtained in order to gain priority to an expected claim of the Crown under a recognizance.—*The Attorney-General v. Harmer*, 16 Grant, 533.

A debtor conveyed land to his father and brother-in-law respectively, which they claimed to be *bona fide*, and for valuable consideration; on a bill by a creditor the Court was not entirely satisfied with the account which was given of the transaction with the father, and had serious doubts in regard to the transaction with the son ; but being of opinion that the evidence was insufficient to prove the account of the transaction on the defendants' part to be false, sustained both conveyances.—*Ib.*

Where a creditor simply seeks to have a deed made by his debtor declared fraudulent and void, it is not necessary to allege that the creditor has carried his claim to judgment.—*Longeway v. Mitchell*, 17 Grant, 190.

In such a case, however, the creditor must sue on behalf of himself and all the other creditors.—*Ib.*

Where mortgagees sold the mortgage to defeat or delay their creditors, but the vendee had no actual notice of the purpose, it was *held*, that the circumstance of his having employed one of the mortgagees as his solicitor in drawing the assignment, &c., did not make the knowledge of the solicitor notice to the vendee.—*Cameron v. Hutchinson*, 16 Grant, 526.

To maintain a sale impeached by creditors, it is not sufficient in this Court to prove that the transaction was really intended to pass the property ; for, as laid down by the Court of Error and Appeal in *Gotwalls v. Mulholland*, "although the sale may have been *bona fide*, with intent to pass the property, yet if made with intent by vendor and purchaser to defeat and delay creditors, it would be void." *The Merchants' Bank v. Clarke*, 18 Grant, 594.

An insolvent person sold his land to his brother ; a creditor filed a bill impeaching the sale as fraudulent ; part of the consideration was said by the defendants to be a pair of horses and waggon of the value of \$200 ; but the parties had fraudulently given out after the sale that these horses were still the horses of the brother who had bought the land, and in this way had misled the plaintiff and other creditors.

Held, that this brother was estopped from afterwards setting up against the creditor that the \$200 had been paid in that way, and the plaintiff's debt being less than that amount, he was *held* entitled to a decree for payment, or in default, a sale of the land. *McCarty v. McMurray*, 18 Grant, 604.

A married woman entered into a contract for the purchase of land, one of the terms being that the conveyance should be to herself. In payment of the principal part of the purchase money the husband assigned to the vendor a mortgage he held on other property, which, so far as appeared, was his only means. It did not appear that he was indebted at the time, but a month afterwards he endorsed a note for £40, which was not paid. The family, including the husband, went into possession of the land immediately after the purchase, and made improvements, but no deed was obtained, and a small balance

of the purchase money remained unpaid for twelve years, when the money was raised by a loan on the property, and the deed was taken to a son of the purchaser.

Held, that this deed was void as against the holder of the note. *Waddell v. McGinty*, 15 Grant, 261.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS—ATTORNEY AND CLIENT—PARTNERS.

FURTHER DIRECTIONS.

See DISMISSING BILL ON—HEARING ON—PRODUCTION OF DOCUMENTS.

GARNISHEE.

A garnishee order granted by the Court on an application in Chambers is regular.—*Robertson v. Grant*, 3 Cham. R. 331.

Where money, the proceeds of lands belonging to some of the defendants, had been ordered to be paid into Court to meet a judgment held by the plaintiff against one of the defendants, and the decree directed that the plaintiff should pay to the other defendants their costs of suit; *Held*, that these defendants were entitled to a garnishee order against the money to be paid into Court. *Grant v. Kennedy*, 2 Cham. R. 269.

GENERAL ORDERS.

The 554th General Order, as to filing a certificate of the applicability of the lower scale tariff, is directory; and the omission of it does not entitle a defendant in case of a dismissal of the bill to the higher scale costs, except for fees of Court actually paid. *Ferguson v. Rutledge*, 18 Grant, 511.

Where a second mortgagee files a bill for redemption, and

makes default in paying at the time appointed, the mortgagor (as well as the first mortgagee) has, under the General Order 466, the option of having a day thereupon appointed for redemption of the first mortgage by the mortgagor. *McKinnon v. Anderson*, 18 Grant, 684.

GENERAL PRAYER.

A person having a second charge on land, filed a bill against the holder of a prior mortgage, and the owners of the equity of redemption, praying redemption and general relief: *Held*, that the absence of a specific prayer as to the latter defendants did not disentitle the plaintiff to relief against them. *Long v. Long*, 17 Grant, 251.

GIFT.

Deed of Gift.—Parent and Child.

In the case of a gift from a parent to a child, there is no rule which requires the child, in the absence of evidence shewing imposition or undue influence, to support the deed, by the evidence which might be necessary in the case of a gift from a child to a parent. *Wycott v. Hartman*, 14 Grant, 219.

A parent was not permitted to recall a gift, which, in view of the marriage of one of her two sons, she had made verbally to the two, of certain arrears of an annuity which had accrued due from them while she lived with them; the attempt to recall the gift not having been made until after the marriage and death of the son. [*Per* MOWAT and STRONG, V-CC., SPRAGGE, C. *dissenting.*] *Long v. Long*, 16 Grant, 239 & 17 Grant, 251.

Father to Son.

A gift can only be upheld if clearly proved and where evidence of loose, casual, and inconsistent admissions and statements was offered to prove a gift of all the donor's means; the evidence was held insufficient. There is ordinarily no presumption of undue influence in the case of a gift from a father to a

son unless it is proved that the son occupied towards the father at the time a relation of confidence and influence ; but if that is proved, the gift may need for its support the same evidence of due deliberation, explanation and advice as a gift to any other person occupying such relation of confidence and influence. Where there is no proof of *mala fides* or of an unfair exercise of influence, a gift of a trifling sum, as compared with the donor's property, does not stand in the same position as a gift of his whole property.

If the donee is a son who occupied to his father (the donor) a relation of confidence and influence, though a gift of the whole of his father's means, if large, may not be upheld without the evidence required in other cases of due deliberation, explanation and advice, the gift of more than a trifling proportion may be sustainable without such evidence. *McConnell v. McConnell*, 15 Grant, 20.

GOOD FAITH.

See VOLUNTARY CONVEYANCES ACT, 1868.

GOOD FRIDAY.

Where notice of motion had been given of an application to commit for not bringing in accounts in the Master's office, and four days intervened between the service and the motion, one of which was Good Friday, during which the Master's office had been closed, the Secretary refused the application without costs. *Wilson v. Gould*, 2 Cham. R. 236.

GOOD-WILL, SALE OF.

The defendant sold to the plaintiff the good-will of the business of an innkeeper which he was carrying on in London, in this province, under the name of "Mason's Hotel," or "Western Hotel."

Held, [affirming the decree of the Court below] that the sale

of the good-will implied an obligation, enforceable in equity, that the defendant would not thereafter resume or carry on the business of an innkeeper in London, under the name of "Mason's Hotel," or "Western Hotel;" and would not resume or carry on the business of an innkeeper, under any name or in any manner, on the premises in question; and would not hold out in any way that he was carrying on business in continuation of, or succession to the business formerly carried on by him under the said names, or either of them.

Held, also, [varying the decree of the Court below,] that a covenant in the agreement that the vendor should pay \$4000 in the event of his carrying on business as an innkeeper within ten years, was void as an undue restraint of trade, but did not relieve the vendor from the implied obligation involved in the sale of the good-will. *Mossop v. Mason*, In Appeal, 18 Grant, 453. Reported in Court below, 17 Grant, 360; and 16 Grant, 302.

GREENHOUSE AND MACHINERY.

See LANDLORD AND TENANT.

GUARDIAN.

See INFANTS, II.

HEARING.

See POSTPONING HEARING.

1. *Hearing and Examination.*

A motion was granted for postponing the hearing and examination of a cause, on the grounds of the absence of a material witness, after notice of hearing had been given, although the cause had been at issue for some months previous.

The costs of such a motion are costs in the cause. *Graham v. Machell*, 2 Cham. R., 376.

2. *Hearing Chambers Motion before a Judge.*

When a party moving desires to have his application heard before a judge, it does not entitle him to have it heard at a future day; but it may be heard at once.

The Court will not encourage the hearing of motions before a judge, where the object of doing so is obviously to gain time after it has been refused by the Secretary. *Lachlan v. Reynolds*, 2 Cham. R. 454.

3. *Hearing on further directions.*

In a case where fourteen days have elapsed since the confirmation of the Master's report, the plaintiff will not be permitted to set down the cause on further directions for a distant day, to the delay of the defendants. Where, under such circumstances, the cause had been set down on further directions by both parties, a motion by the plaintiff to strike the cause out of the list, the setting down by the defendant being for an earlier day, was refused with costs. *Poole v. Poole*, 2 Cham. R., 379.

4. *New Hearing.*

Where the defendant's solicitors, through the neglect of their clerk, were not aware until after the hearing that the cause had been set down or notice of hearing served, and the question raised by the answer was as to the defendant's liability on a judgment recovered against him by his solicitor, the Court allowed a new hearing after the decree was drawn up and entered, on payment of costs.

The application for such a purpose should be by petition to the Court, and not by motion in Chambers. *Donovan v. Denison*, 2 Cham. R., 284.

HEIRS.

See WILL.

HUSBAND AND WIFE.

Suits between. See ALIMONY.

Examining. See EXAMINATION, II.

See also MARRIED WOMAN, NEXT FRIEND—DEED VI.

Where a wife took an active part in her husband's business, and had the custody of his money, sums paid to her were treated as paid to the husband.

An executor without proving the will has power to do almost all the acts which are incident to his office; and on the other hand, if he acts, and does not renounce or make known his intention not to act, he is in general disqualified to engage in any transaction for his own benefit to the prejudice of those interested in the estate, quite as much as if he had taken out probate.

A. died leaving all she had to her sister B., an old, feeble and ignorant woman, and appointed C. her executor. C. did not prove the will, but he acted as executor; he also removed the plaintiff to his house, and intimated that he meant to take care of her during the rest of his life. The testatrix had a life estate in some cottages, and after her death the remainderman was induced by C. and others, for the purpose of benefiting the plaintiff, to sell them for less than half their value, and to convey them to C.'s wife, it being supposed that C. would have to advance the money out of his own funds, but the fact being that he had money in his hands as trustee for the plaintiff sufficient to pay the price.

Held, that C. and his wife could not retain the benefit of the purchase, and that the plaintiff was entitled to a conveyance. *Robinson v. Coyne*, 14 Grant, 561.

A purchase by a wife from her husband, the consideration being paid out of her separate estate was *held* to be maintainable against creditors of whose debts she had no notice. *Hill v. Thompson*, 17 Grant, 445.

The husband after the purchase expended money in improving the property: *Held*, in a suit by a judgment creditor of the husband to obtain the benefit of such expenditure, that the wife was entitled to shew that the debt for which the judgment was recovered had been satisfied before action was brought. *Id.*

A man and woman lived together as husband and wife, the

man having a wife living at the time ; and land purchased in the man's name was paid for by the woman out of money of her own : *Held*, that there was a resulting trust in favour of the woman. *Hoig v. Gordon*, 17 Grant, 599.

Where for ten years a wife concealed from the public her relation to her husband ; and allowed him to live with another woman as his wife under an assumed name—the real wife living in the neighbourhood and receiving from them her own support, it was held that she was precluded from claiming dower out of land purchased during this period in the husband's assumed name and afterwards sold by him and his supposed wife to a purchaser who bought in good faith and without any notice of the real relationship of the parties. *Ib.*

IDIOT.

See NEXT FRIEND.

IMMEDIATE SALE.

See INFANTS.

IMPRISONMENT FOR DEBT.

The provisions of the Con. Stat. cap. 26, apply to the Court of Chancery, and a debtor confined under a writ of arrest may apply for his discharge under section seven thereof.—*Lawson v. Crookshank*, 2 Cham. R., 413 ; S. C. 426 ; *Pherill v. Pherill*, 2 Cham. R. 444.

IMPROVEMENTS.

See SETTING ASIDE SALE.—CONVEYANCE, II. 4.—EXECUTORS, III.

Charge for. *See* PARTITION.

Payment for. *See* PURCHASE UNDER MISTAKE.

INADEQUACY OF CONSIDERATION.

See VENDOR AND PURCHASER.

INCEPTION OF EXECUTION.

See EXECUTION.

INCORPORATED COMPANY.

Charge on Property of.

An incorporated company having executed a bond which, though it contained no direct words of charge, was evidently intended to give a lien on the property of the company, it was held that the lien was sufficiently created. *Town of Dundas v. The Desjardins Canal Co.*, 17 Grant, 27.

INCUMBRANCES, COVENANT AGAINST.

See VENDOR AND PURCHASER.

INDEMNITY.

See PRINCIPAL AND AGENT.

INDIAN LANDS.

The Act respecting Indian Lands authorized the Governor in Council to declare applicable thereto the Act respecting timber on public lands ; an Order in Council was issued accordingly ; eight years afterwards another Act was passed which contained a clause authorizing the Governor in Council to declare the Timber Act applicable to Indian Lands, and to repeal any such Order in Council and substitute others, and another clause authorizing the Governor in Council to make regulations and impose penalties for the sale and protection of timber on Indian lands : *Held*, that the Timber Act continued in force until revoked or altered by a new Order in Council. *The Attorney-General v. Fowlds*, 18 Grant, 433.

INDORSERS.

See CONTRIBUTION—ACCOMMODATION INDORSER.

INFANTS.

See NEXT FRIEND—SECURITY FOR COSTS—GUARDIAN—CHILD.

I. PRACTICE IN SUITS WHERE INFANTS ARE CONCERNED.

II. GUARDIAN OF, APPOINTING, DUTIES OF, &c., AND GUARDIAN AD LITEM.

III. INFANTS' MONEY, INVESTING, &c.

IV. MAINTENANCE.

V. TRUSTEES.

VI. SALE.

I. PRACTICE IN SUITS WHERE INFANTS ARE INTERESTED.

The solicitor of the plaintiff, in ignorance of the plaintiff's death, had, after that event, taken certain proceedings in the cause. On a motion to confirm these proceedings, it was *held* that no order could be made except by consent. *Graham v. Davis*, 2 Cham. R., 187.

Where infants have been made parties by revivor, they cannot set up a defence which their ancestor had not set up, except when such ancestor has been prevented by fraud or mistake from pleading such defence; and all the more particularly where the deceased defendant has been guilty of gross laches. *Burke v. Pyne*, 2 Cham. R., 193.

Where the defendant was shewn to have been an infant at the time when the note *pro confesso* was entered, such noting, and all subsequent proceedings, were set aside; but as the defendant was tardy in applying, and his conduct in the matters complained of in the bill censurable, the order was made without costs; and he, being now of age, was ordered to answer in a fortnight. *Adams v. Guillott*, 2 Cham. R., 427.

Where it appeared to be for the benefit of the infants interested, and the plaintiffs, who were the only incumbrancers, consented, an immediate sale was ordered at the instance of the guardian of the infants, without requiring the consent of the mortgagor. *Cayley v. Colbert*, 2 Cham. R., 431.

Proceedings which a defendant allows to be taken against him, after he comes of age, are binding on him.

There is no necessity for his being served with notice of the suit after his coming of age.

A motion to set aside such proceeding as irregular and void was refused with costs; but the defendant was allowed to take an order giving him leave to falsify any of the items in the costs taxed, and accounts allowed by the Master, reserving the costs of reference. *Lawrason v. Buckley*, 2 Cham. R., 477.

Where, in consequence of some of the defendants being infants, a conveyance which might otherwise have been settled by the parties, was necessarily referred to a Master, the cost of such reference was ordered to be borne by the testator's estate. *Rodgers v. Rodgers*, 2 Cham. R., 241.

Reference to arbitration. *Allan v. O'Neil*, 2 Cham. R., 22.

Enquiry whether sale beneficial. *Graham v. Davis*, 2 Cham. R., 24.

Day to shew cause. *Sutherland v. Dixon*, 2 Cham. R., 25.

It must appear clearly that the Master reports a sale beneficial to infants before a final order for sale will be made. *Edwards v. Burling*, 2 Cham. R., 48.

Where a legacy bequeathed to an infant had been paid into Court, the interest thereon was ordered to be paid out as it accrued for the education and maintenance of the infant, on its being shewn that the money was required for these purposes. *Griffin v. McGill*, 2 Cham. R., 318.

II. GUARDIAN OF, APPOINTING, DUTIES, &c., AND GUARDIAN AD LITEM.

When a *prima facie* case is made, shewing that no conflicting interest exists between the infants and the proposed guardian, or the party proposing him, the Court will not go into the question of the fact or extent of interest. *Ferguson v. Langtry*, 2 Cham. R., 473.

The Court will exercise supervision over solicitors appointed guardians *ad litem*, and expect at their hands a proper attention to the interests of the infant parties. *Duncan v. Ross*, 2 Cham. R., 443.

When, on a plaintiff's motion for appointing a guardian to an infant defendant, the person appointed is nominated by or at the instance of the infant, he is not entitled, as of course, to his costs against the plaintiff.

On such a motion, the Master should not appoint the plaintiff's nominee, but should select one of the practitioners in the County town, the one who seems best fitted, on the whole, for the duty, and appoint him in all cases in which he is not concerned for any of the parties, if no nomination is made on the part of the infants, and if no special reason exists for naming, in preference, some other solicitor. *Clements v. Arnold*, 3 Cham. R., 75.

There was a contest in a Surrogate Court between the stepfather and uncle for the guardianship of a child of ten or eleven years old ; the child preferred her stepfather, and the Surrogate Court appointed him guardian ; but this Court, on appeal, being satisfied from the evidence that it was for the real interest of the child that the uncle should be guardian, reversed the order below. *Re Irwin*, 16 Grant, 461.

On a petition for the appointment of a guardian of an infant other than his father who was living ; it was held necessary that notice of the application should be served on the father. *Re Hendricks*, 2 Cham. R. 418.

Ad litem.

An order appointing a guardian *ad litem* was set aside for irregularity where it was shewn that the notice of motion for the appointment did not allow the infant six weeks to appear and shew cause, but the guardian thus irregularly appointed, was allowed his costs up to decree. *Hamilton v. Hamilton*, 2 Cham. R., 160.

III. INFANTS' MONEY, INVESTING, &c.

In consequence of the danger to which the fortunes of infants are often exposed in private hands, the Court, on the administration of an estate, takes charge of the share going to infants, and invests the same for their benefit, instead of the amount being left in the hands of a trustee.

Since the establishment of a Government Dominion Stock, the investment of infant's money by the Court should, as a general rule, be in such stock, rather than, as formerly, in mortgages. *Kingsmill v. Miller*, 15 Grant, 171.

Sanction of Court.

A petition had been presented for the sale of an infant's estate, fifty acres of lands, which produced \$700 and upwards. On an application that the proceeds might be invested in the purchase of a farm, with the sanction of the Court, on which it seemed to be intended the father of the infant—a farm labourer—was to reside with the infant; the Referee refused to sanction the same,

The circumstances under which such sanction would be given considered. *Re Mason*, an infant, 3 Cham. R., 426.

IV. MAINTENANCE.

In a proceeding under the 12th Victoria, chapter 72, the mother of the infants was appointed guardian, and the sale of the greater part of the real estate of the infants was ordered; which was accordingly effected; the proceeds being applied in payments of the estate, but no investment of the surplus was made, although that course was directed by the order: the whole of such proceeds together with \$5,321 in addition, were expended in the support and education of the infants. The guardians thereupon applied for an order to sell the remainder of the real estate. The court refused the application, notwithstanding that the Master reported the amount claimed was a proper sum to be allowed. In *Re Hunter*, 14 Grant, 680.

By a deed of trust certain lands were conveyed to trustees for the benefit of an infant to whom the trustees were to convey in fee on her attaining twenty one: *Held*, that the infant

took a vested interest ; and the Court directed an inquiry as to her past and future maintenance. *Stewart v. Glasgow*, 15 Grant, 653.

A testator bequeathed a legacy to an infant daughter, payable on her attaining twenty one, and charged the same on the shares of two of the devisees ; but the will was silent as to interest upon the legacy ; *Held*, that the infant was entitled to maintenance out of the estate of the testator, to the extent (if necessary) of the interest on the legacy ; and an enquiry as to the ability of the widow of the testator to maintain the infant was refused. *Binkley v. Binkley*, 15 Grant, 649.

Maintenance under the statute can only be ordered where the infant is under twelve years old and is transferred by the Court to the mother's custody. *Re Eves*, 15 Grant, 580.

A stepfather's claim to be paid for past maintenance of a minor out of her capital, was rejected on the ground of his misconduct. *Fielder v O'Hara*, 16 Grant, 610.

V. TRUSTEES, &c.

When new trustees are to be appointed, it is contrary to the course of the Court, without some special reason to sanction the appointment of one trustee in the place of three. *Kingsmill v. Miller*, 15 Grant, 171.

In a proper case trustees may be allowed payments made by them, for the maintenance and education of children out of their capital. *Stewart v. Fletcher*, 16 Grant, 235.

VI. SALE.

In a suit for partition where infants were interested, affidavits were produced showing that a sale rather than petition would be more for the benefit of the infants, and that the property from its nature and situation was not susceptible of equal partition, the Court directed a reference to the Master to enter into contracts for the sale of portions of the estate, which sales should be carried into effect upon being approved of by the Judge. *Steven v. Hunter*, 14 Grant, 541.

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INFORMATION.

An Act having been passed authorizing the construction of a street railway, confirming a covenant entered into for the purpose with the municipal corporation, and providing that the rails should be laid flush with the streets, &c., it was *held*,—

That the rails must not only be flush when laid, but must be kept flush.

That to enforce the contract against the company, a suit by the municipal corporation, the other party to the contract, was necessary.

That an information by the Attorney-General to enforce the statutory restrictions was proper, and that unless the parties concerned chose, by proper alterations and repairs, to comply with the requirements of the statute, the Attorney-General was entitled to a decree for the removal of the rails as of a nuisance; but that the municipal corporation was a necessary party to the information. *The Attorney-General v. The Toronto Street Railway Company*, 14 Grant, 673.

INJUNCTION.

Interim. See AFFIDAVIT.

Amending without prejudice to. See AMENDING, I., 9.

Mandatory. See MORTGAGE.

See also CANAL—CHARITABLE USES—DOWER, II.

I. TO RESTRAIN PROCEEDINGS AT LAW.

1. *Restraining Execution.*

- (a) *Affidavits*
- (b) *Delay.*
- (c) *When refused.*
- (d) *In Ejectment.*
- (e) *Rule Nisi in Court no bar.*
- (f) *Restraining distress.*

II. IN RESTRAINT OF WRONGFUL ACTS.

- 1. *Against selling lands bought with stolen money.*
- 2. *Against the removal of machinery.*

3. *Against using Trade Mark.*
4. *Against using Partnership name.*
5. *To stay Waste.*
6. *Against selling Property.*
7. *Against impeding Navigation.*
8. *Between Tenants in Common.*
9. *To prevent evasion of an Act of Incorporation.*

III. OBEYING AND BREACH OF.

IV. IN AID OF SPECIFIC PERFORMANCE.

I. RESTRAINING PROCEEDINGS AT LAW.

1. *Restraining Execution.*

On an application for an injunction against an execution at law, the plaintiff in equity has not necessarily to satisfy the Court by evidence that the facts, if disputed, are as his bill and affidavits state; but only that there is a substantial equitable case which ought to be decided before execution goes. *Treadwell v. Morris*, 15 Grant. 165.

Where a party who is wrongfully sued at law comes into equity promptly, so that, by means of our system of circuits, his equitable case can be tried within a few weeks of the time when a legal defence would be triable at law, if he verifies his bill, shewing a good equitable case that is only triable in this Court, he can seldom be refused an injunction to restrain any execution going until the equitable questions are disposed of. *Ib.*

(a) *Affidavits.*

There is no technical rule requiring the plaintiff's affidavit in support of a motion for an injunction to be corroborated by other evidence; though the absence of other evidence may sometimes be a circumstance material to be considered. *Ib.*

(b) *Delay.*

If a defendant at law is guilty of delay in instituting his suit here, this may not be a bar to his application for an injunction; but the Court, for the security of the plaintiff at law,

may require the payment of the money into Court, to abide the event ; or may impose other terms which in case of a prompt application it might not be just or reasonable for the Court to exact. Or, the Court may, in the exercise of its discretion, refuse the motion altogether, notwithstanding the *prima facie* case which the plaintiff's bill and affidavits present in his favour ; and, in view of this discretion, it may be expedient for the plaintiff in such a case to fortify his own affidavit with other evidence, which in case of an earlier application might have been unnecessary. *Treadwell v. Morris*, 15 Grant, 165.

A defendant at law unnecessarily delayed filing his bill for an injunction until it was too late to have the equitable case it set up heard for six months ; there were executions to a large amount out against his lands at the suit of other persons ; and the defendant in equity swore that, if delayed by an injunction, he believed he would probably lose his debt. This statement not being met by any counter affidavit, an injunction was refused, except upon the terms of paying the money into Court. *Ib.*

Where the plaintiff's title was disputed, and the injury of which he complained had been going on for three years, and was not any greater at the time the plaintiff moved for an interlocutory injunction than it had been for three years before, the Court refused the motion. *Rich v. Brantford*, 14 Grant, 83.

(c) *When refused*

A defendant pleaded an equitable defence as if it were a legal defence, omitting the words "for defence on equitable grounds ;" the plaintiff replied and demurred ; the issue in fact was first tried, and went to the jury on the merits ; the verdict was for the defendant, and the demurrer was afterwards allowed. Judgment having been entered the defendant filed a bill, setting up the facts stated in the plea, and praying for an injunction.

Held, that the proceedings at law were a bar to relief. *Arnold v. Allinor*, 15 Grant, 375.

(d) *In Ejectment.*

The equity of redemption in mortgaged premises was sold under execution at law, and a conveyance thereof was executed by the sheriff, purporting to convey the same to the purchaser, who subsequently paid off the mortgage; obtained from the mortgagee a statutory discharge thereof, which he caused to be registered; and went into possession of the mortgaged property. In a proceeding at law, the sale by the sheriff was declared void in consequence of the invalidity of the writ under which he assumed to sell:

Held, that the purchaser was entitled to restrain an action of ejectment brought by the mortgagor to obtain possession of the mortgaged premises. *Howes v. Lee*, 17 Grant, 459.

A mortgagor filed his bill alleging that nothing was due on the mortgage, and moved for an injunction to restrain execution in the ejectment. The defendant set up a purchase and release of the equity of redemption, and alleged that except by means of this purchase the mortgage was not paid. The Court considered that the evidence shewed that there was a fair case to try as to the validity of the alleged purchase, and granted an injunction on the plaintiff's paying into Court \$200, and entering into the usual undertaking. *Keating v. McKee*, 14 Grant, 608.

On a motion for an injunction to stay an ejectment brought by the devisees of the plaintiff's father, the plaintiff's case was, that his father had verbally agreed to give the plaintiff the land for work which, after coming of age, the plaintiff had done for his father; that two years afterwards the plaintiff on his marriage went into possession with his father's permission, but subsequently to his father's having refused to give him a deed, or to part with the control of the property; and that the plaintiff remained in possession to his own use for eight years, when his father died, leaving a will by which he devised the property to the defendants.

Held, that the plaintiff could not enforce the alleged agreement; and an injunction was refused. *McKay v. McKay*, 15 Grant, 371.

(e) *Rule Nisi in County Court no bar.*

A rule nisi in a County Court, for staying an execution on the ground that the execution had been satisfied, having been discharged :

Held, no bar to an interlocutory injunction in this Court on the same ground. *Bush v. Bush*, 15 Grant, 431.

(f) *Restraining Distress.*

Two persons were in joint possession of property of the one, and carried on business therein as partners when the owner of the property mortgaged it, giving a power of distress in case of default, and the mortgagee afterwards distrained on the partnership property. On a bill by the assignee of the other partner, it not appearing that the latter assented to, or had notice of, the mortgage, the court granted an injunction to the hearing of the cause. *Mason v. Parker*, 16 Grant, 81.

II. IN RESTRAINT OF WRONGFUL ACTS.

1. *Against selling lands bought with stolen money*
2. *Against the removal of Machinery.*
3. *Against using Trade Marks.*
4. *Against using Partnership name.*
5. *To stay Waste.*
6. *Against selling Property*
7. *Against impeding Navigation.*
8. *Between Tenants in Common.*
9. *To prevent evasion of an Act of Incorporation.*

II. (1) *Against selling lands bought with stolen money.*

Where a robbery had been committed in a foreign country but no trial had taken place, and the money stolen had been invested in the purchase of property in this country, the Court granted an injunction to restrain the selling or incumbering thereof.

If the Court can trace money or property however obtained from the true owner into any other shape, it will intervene to secure it for the true owner by holding it to be his in equity, or by giving him a lien on it.

Accordingly, where money was stolen, the owner was held

entitled to a leasehold, furniture, and other chattels purchased with the stolen money, and an injunction was granted to restrain parting therewith until the hearing. *The Merchants' Express Company v. Morton*, 15 Grant, 274.

II. (2) *Against the removal of Machinery.*

A mortgage having been created on land on which was erected a steam saw mill the mortgagor was restrained from removing the machinery out of the mill, although it was alleged that the property would still remain a sufficient security, as the effect of such removal would have been to change the nature and character of the mortgaged premises. *Gordon v. Johnston*, 14 Grant, 402.

II. (3) *Against using Trade Mark.*

Circumstances under which injunction granted restraining use of label an infringement of a plaintiff's trade mark. *Radway v. Colman*, 15 Grant, 50.

II. (4) *Against using Partnership name.*

Circumstances under which refused. *Aikens v. Piper*, 15 Grant, 581.

II. (5) *To stay Waste.*

Such proof of possession as is sufficient to maintain a suit at law against a wrong-doer, is sufficient *prima facie* proof of title to enable a party to obtain a decree for an injunction to restrain waste. *Walker v. Friel*, 16 Grant, 105.

II. (6) *Against selling Property.*

On a motion for injunction to stay the wrongful selling of property by the legal owner, the plaintiff's affidavits alleged that the principal defendant had sold, or pretended to sell, to his son who was also a defendant, but by mistake no injunction was asked against him. No threat of any further sale was alleged. The defendant filed no affidavit in answer:

Held, that the allegations were sufficient, and an injunction was granted. *Boardman v. Wroughton*, 16 Grant, 384.

II. (7) *Against impeding Navigation.*

An Act of Parliament having provided that it should be lawful for a Canal Company to cut a channel across a certain highway, and to erect, keep, and maintain a safe and commodious bridge across the canal; and the bridge, after being erected, having become unsafe through the default of the Canal Company, an incorporated Road Company acquired the road, made several endeavours to get the bridge repaired, but all of them having failed through the insolvency of the Canal Company, the Road Company at length commenced the erection of a fixed bridge, which would have the effect of impeding the navigation of the canal:

Held, [reversing the decision of the Court below,] that they had not any right to do so, and a permanent injunction was granted restraining them [SPRAGGE C., and MOWAT, V. C., dissenting.] *The Town of Dundas v. The Hamilton and Milton Road Co.*, In Appeal, 18 Grant, 311.

II. (8) *Between Tenants in Common.*

The plaintiff and *L.* were tenants in common of an oil well; they filled an oil tank with oil equal in quantity to 2,400 barrels, of which 1,600 belonged to the plaintiff and 800 to defendant, and they agreed that the oil was not to be sold under \$5 a barrel; they were not partners. *L.*, without authority, contracted for the sale of all the oil in the tank at \$1.25 a barrel.

Held, on a bill against the purchaser, that *L.* had no right to sell the plaintiff's portion of the oil; that the defendant's removal of it would be wrongful; but that as the oil was a staple commodity which had not any peculiar value, and as there was no fiduciary relation between the plaintiff and *L.*, the plaintiff was not entitled to an injunction; and that his only remedy was an action at law. *Mason v. Norris*, 18 Grant, 500.

II. (9) *To prevent evasion of an Act of Incorporation.*

The Act (22 Vic. ch. 122) incorporating the North-west Transit Company, enacted that it should not be lawful for the

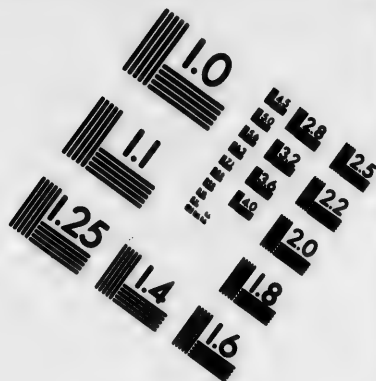
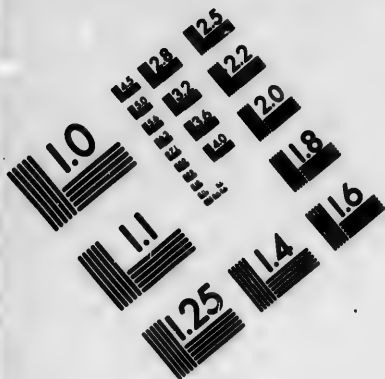
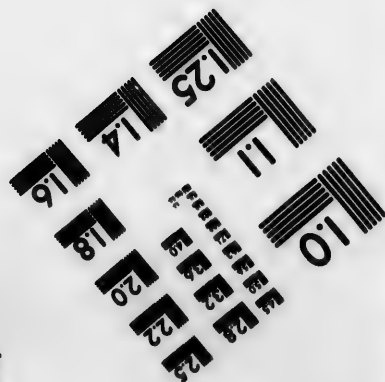
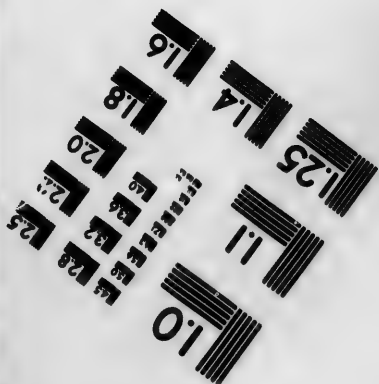
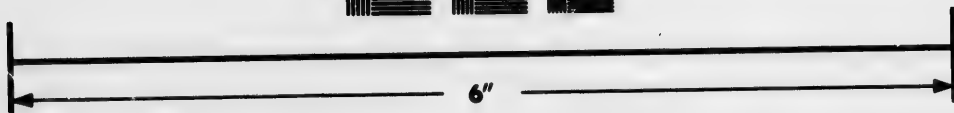
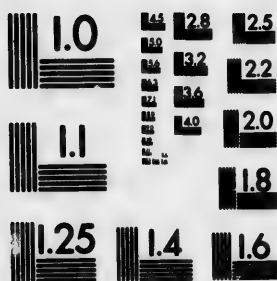


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Company to proceed with their operations under the Act until £50,000 of the capital stock shall have been subscribed, and ten per cent. shall have been paid thereon.

Subsequently and before £50,000 had been subscribed or the percentage paid thereon, a proposition was made by one C. to certain stockholders in the enterprise, that C. should sell a steam vessel belonging to him to the Company for £5,000, and that in that event he should become a subscriber to the amount of £50,000, and that the steamer should be paid for by taking her as a payment of ten per cent. on the £50,000, which was acceded to, and the subscription and purchase made accordingly in compliance with a resolution of the Company.

Held, that this was an evasion of the Statute, and an injunction was granted on motion restraining the Company from proceeding with any of the operations thereof until the conditions pointed out by the Statute had been complied with. *Howland v. McNab*, 8 Grant, 47.

III. OBEYING AND BREACH OF.

1. Injunctions must be obeyed according to the spirit as well as letter. *Bickford v. The Welland Canal Company*, 17 Grant, 484.

2. Where defendants were enjoined against removing from their premises certain iron rails to which the plaintiff claimed to be entitled, and they allowed another claimant to take them away without objection or obstruction on their part, and to remove them to the United States :

Held, that they had committed a breach of the injunction. *Id.*

3. After an injunction restraining the felling of timber had been issued and on the same day the writ was served, the plaintiff entered into a written agreement with the principal defendant in the cause, by which the latter agreed to give up possession of the premises in question on a particular day, and to refrain from cutting or removing any timber cut in the meantime ; and the plaintiff thereby agreed " that I, the said, T. M., do hereby, upon the above conditions being complied with, withdraw all suits now pending," &c. The defendant, having, notwith-

standing continued to cut down and remove the timber, a motion was made to commit him for breach of injunction, when it was *held* that the suit was still pending, the acts agreed to be done by the defendant, being a condition precedent to the withdrawal of the suit. *Mulholland v. Downes*, 14 Grant, 106.

4. A defendant is bound to obey an injunction of which he is made aware, before being served with it; but the plaintiff must not be guilty of delay in effecting formal service, as the rule for dispensing with such service applies only until the plaintiff has time to make the service. *Stewart v. Richardson*, 17 Grant, 150.

5. Where a breach of an injunction was sworn to by a single deponent, and was denied by the defendant, and there was no corroborative evidence, the Court refused a motion to commit. *Ib.*

6. Where the defendant, being part owner of a schooner and in sole possession, excluded therefrom the plaintiff, who was the other part owner, and the plaintiff did not allege that there had been any dispute as to the employment of the vessel, an injunction to restrain the defendant's proceedings was refused. *Baker v. Casey*, 17 Grant, 195.

IV. IN AID OF SPECIFIC PERFORMANCE.

An agreement for a lease provided for the building of a barn by the tenant; the assignee of the owner, considering that a barn which the tenant had begun to build was not such as the agreement required, filed a bill for an injunction and for specific performance of the agreement generally: the answers insisted that the barn was such as the defendant undertook to build. The Court being of opinion that the injunction was the real object of the suit, and that the plaintiff was not entitled to an injunction dismissed the bill:

Held, that this decree was no bar to a subsequent suit by the tenant for specific performance of the agreement for a lease. *Simmons v. Campbell*, 17 Grant, 612.

INSOLVENCY, INSOLVENT, INSOLVENT ACTS.

See ATTACHMENT, 6.

I. THE SUBJECT GENERALLY.

Miscellaneous decisions under the circumstances indicated by the following heads :

1. *Where mortgage by Insolvent upheld.*
2. *Where lands of Insolvents had been sold under order of Court of Chancery.*
3. *Costs in.*
4. *Marriage settlement by.*
5. *Where creditors held bound to account.*
6. *Preference given under pressure.*
7. *Preference on real estate.*
8. *Advance of goods to.*
9. *Composition.*
10. *Preference in foreign country.*
11. *Official Assignee, &c.*
12. *Suit becoming defective by.*
13. *Double proof.*

1. *Where Mortgage upheld.*

In 1869 *C.* lent money to *N.* on an express agreement that it was to be secured by mortgage on certain property ; and on the 3rd July following the mortgage was given accordingly ; and on the 2nd August the mortgagor became insolvent :

Held, that the mortgage was valid. *Allan v. Clarkson*, 17 Grant, 570.

A banking firm in Toronto, having become embarrassed by gold operations in New York, applied to the plaintiffs, to whom they owed \$50,000, to advance them \$15,000 more ; and in order to obtain the advance, they offered to secure both debts by a mortgage on the real estate of one of the partners, worth \$30,000. The plaintiffs agreed, made the advance, and obtained the mortgage. In less than three months afterwards the debtors became insolvent under the Act. They were indebted beyond their means of paying at the time of executing the mortgage,

but they did not consider themselves so, nor were the mortgagees aware of it. The mortgage was not given from a desire to prefer the mortgagees over other creditors, but solely as a means of obtaining the advance which they thought would enable them to go on with their business and pay all their creditors :

Held, that as respects the antecedent debt the mortgage was valid as against the assignee in insolvency. *The Royal Canadian Bank v. Kerr*, 17 Grant, 47.

2. *Where lands of Insolvent had been sold under order of Court of Chancery.*

Where, previous to an act of insolvency, certain lands in which the insolvent, a defendant in a suit in Chancery, had an equitable interest, had been ordered to be sold, and were afterwards sold, and the purchase money paid to the plaintiff in equity ; the assignee in insolvency moved that such moneys be paid into Court for the benefit of the general creditors. It was held that such lands were subject to the order for sale, and the motion refused with costs ; but the assignee was allowed his costs out of the estate, as the question was a new one, and a proper one for him to raise in the interest of the general creditors. *Yale v. Tollerton*, 2 Cham. R. 49.

3. *Costs in.*

Certain funds had come to the hands of an official assignee, but were payable to encumbrancers under claims arising before the insolvency ; the judge in insolvency had ordered certain costs of the insolvent to be paid thereout. On appeal such order was reversed, the Court holding that the 11th section of the Insolvent Act of 1864 applies only to assets which belong to the insolvent beneficially. *Re Stewart*, 3 Cham. R. 95.

4. *Marriage settlement by Insolvent.*

A person in insolvent circumstances conveyed by way of settlement to his intended wife, a lot of land, on which the settler had commenced to put up a house, but which was not completed until after marriage. On a bill filed by the assignees in insolvency the Court declared that for so much of the building as

was completed after marriage the creditors had a claim on the property ; but gave the wife the right to elect whether she would be paid the value of her interest without the expenditure after marriage or pay to the assignees the amount of such expenditure : and it subsequently appearing that the husband had created a mortgage prior to the settlement ; the wife was declared entitled to have the value of the improvements made after marriage applied in discharge of the mortgage in priority to the claims of the creditors. *Jackson v. Bowman*, 14 Grant, 156.

5. *Where creditors held bound to account.*

Where certain creditors of a deceased insolvent sued his executor, recovered judgment, and sold his real estate and got paid in full :

Held, that they were still bound to account, and that the other creditors of the insolvent were entitled to have the whole estate distributed *pro rata* under the Act 29 Victoria, chapter 28. *Bank of British North America v. Mallory*, 17 Grant, 102.

6. *Preference given under pressure.*

A preference which a debtor is induced to give by threats of criminal and other proceedings, is not void under the Indigent Debtors' Act of 1859, or the Insolvent Act of 1864. *Clemmow v. Converse*, 16 Grant, 547.

But to sustain the preference the pressure must have been real, and not a feigned contrivance between the debtor and creditor to wear the appearance of pressure for the mere purpose of giving effect to the debtor's desire and intention to give a preference. *Ib.*

7. *Preference on real estate.*

It is competent to a debtor insolvent, or on the eve of insolvency, to prefer one creditor to another by the conveyance or mortgage of real estate. The same rule applies to a surety. *Curtis v Dale*, 2 Cham. R., 184.

The Insolvent Act (1864) forbids mortgages of real estate

to a creditor by way of preference. But where the mortgagor did not believe he was insolvent (though the mortgagee feared he was so), and made a mortgage of real estate under pressure on the part of the mortgagee, in belief that he (the mortgagor) would thereby be enabled to continue his business, and pay his liabilities in full, the mortgage was *held* valid as against his assignee in insolvency. *Newton v. The Ontario Bank*, In Appeal, 15 Grant, 283.

8. *Advances on goods.*

A bank having cashed a bill of exchange, and taken, by way of collateral security, a bill of sale of certain goods of the drawer, this transaction was *held* not invalidated by the drawer's insolvent circumstances at the time. *Ib.*

9. *Composition.*

By an agreement between a debtor and one of his creditors the latter agreed to accept, by way of composition, certain notes of the debtor, payable at specified dates ; and it was provided that the debtor should also give his note for the whole debt, and that if he were guilty of any default in paying the composition notes, the creditor should rank on his estate for the whole debt. The notes were given accordingly, the debtor made default before the insolvency. The creditor was *held* entitled to prove for the whole debt. In *re McRae*, 15 Grant, 408.

An insolvent compounded with his creditors, and had his goods restored to him ; he thereupon resumed his business with the knowledge of his assignee and creditors, and contracted new debts. It was subsequently discovered that he had been guilty of a fraud which avoided his discharge, whereupon he absconded, and an attachment was sued out against him by his subsequent creditors :

Held, that they were entitled to be paid out of his assets in priority to the former creditors. *Buchanan v. Smith*, 18 Grant, 41.

In such a case the assignee, as representing the former cre-

ditors, was ordered to pay the costs of a suit brought by the subsequent creditors to enforce their rights. *Ib.*

10. *Preference in foreign country.*

An Insolvent absconded to the United States, taking money with him. He was followed there by the agent of a person in this country who had become surety for him, and, by the threats of criminal proceedings induced to pay the amount of the security. A bill, by the official assignee, to recover the money from the surety, was dismissed with costs. *Roe v. Smith*, 15 Grant, 344.

11. *Official Assignee.*

Official assignees cannot be appointed by unincorporated Boards of Trade formed after the passing of the Insolvent Act.

Where a debtor assigns to an official assignee who has not been duly appointed, but the creditors generally accept and act upon the assignment: *Quære*, whether the irregularity in the appointment can be set up by an individual creditor as rendering void the assignment. *Newton v. The Ontario Bank* (In Appeal), 15 Grant, 283.

The other provisions of the Act being complied with, a discharge cannot be refused to the insolvent because of the neglect of the assignee to give notice, as required by sec. 10, subsec. 1, of the Act of 1864, or that the insolvent had no estate. *Re Thomas*, 15 Grant, 196.

Advertisements by assignees in insolvency for the sale of property of the insolvent should describe the property and state the title with the distinctness required in equity in the case of advertisements by trustees and other officials. *O'Reilly v. Rose*, 18 Grant, 33.

In case of a sale by an assignee in insolvency being open to objection on the part of the creditors, the remedy of objecting creditors is by application to the County Court Judge; not by suit in Chancery in the first instance. *Ib.*

12. *Suit becoming defective by.*

Where a suit becomes defective by the insolvency of the plaintiff, subsequent proceedings are not wholly void, but on the fact being brought before the Court, such order will be made as may be just.

Where a suit was commenced in the name of a person who had previously assigned his interest to a creditor by way of security, and the plaintiff became insolvent before decree, but the cause proceeded to a hearing without any change of parties and a decree for the plaintiff was pronounced; the Court made an order, at the instance of the defendants staying proceedings until all proper parties should be brought before the Court. *McKenzie v. McDonnell*, 15 Grant, 442.

13. *Double proof.*

The doctrine against double proof applies only when both estates are being administered in insolvency.

A creditor who has proved in insolvency upon a promissory note made by an insolvent firm, can prove as a creditor in an administration suit against one of the parties deceased who has separately endorsed the note. *Re Baker*, Bray's Claim, 8 U. C. L J., 136, 3 Cham. R., 499.

INSUFFICIENT DESCRIPTION.

See SHERIFF'S DEED.

INSURANCE.

See INTEREST.

1. *Breach of condition in policy.*
2. *Provisional receipt.*
3. *False statement.*
4. *Against partial loss.*
5. *Insurable Interest.*

Conditions in a policy for avoiding the same have, in case of a breach, the effect of avoiding the policy, not *ipso facto*, but if the Insurance Company so elect. *The Canada Landed Credit Co. v. The Canada Agricultural Insurance Co.*, 17 Grant, 418.

[The proper name of the defendants was, "The Canada Farmers' Mutual and Stock Insurance Company."]

Where breaches of such conditions had occurred before loss, and the Insurance Company, after being notified of such breaches, took no notice thereof, but called for the proofs of loss which were required on the footing of the policy being a subsisting instrument; and these were furnished; the Insurance Company was held to have precluded themselves from afterwards setting up the forfeiture. *Ib.*

A condition provided that in case the premises became vacant or unoccupied, the fact should be communicated to the Company, and that unless such notice was given, and the Company consented to retain the risk, the policy should be void:

Held, that the insured had a reasonable time to give the notice: that three days was not too long a delay, the property being at Owen Sound, and the office of the Company at Hamilton; and, a fire having occurred on the third day, the Insurance Company was bound to make good the loss. *Ib.*

An Insurance Company cannot set up, in discharge of their liability, that the preliminary proofs were defective, where they did not make the objection to them when furnished, or until after a suit had been instituted for the loss. *Ib.*

2. *Provisional receipt.*

A applied to an agent of the Royal Insurance Company to effect an insurance and paid the premium. The agent gave the usual receipt, following a form supplied by the Company, and which declared that a policy would be issued by the Company in sixty days if approved of by the Manager at Toronto: that otherwise the receipt would be cancelled and the amount of unearned premium refunded, and that the receipt would be void should camphene oil be used on the premises.

The agent did not report the transaction to the Company, and after the expiration of sixty days a fire occurred :

Held, 1st. That this receipt contained a valid contract for interim insurance.

Held, 2dly. That the Company, and not the insured, should sustain any damage occasioned by the agent's neglect, and that the Company was liable for the loss by the fire. *Patterson v. The Royal Insurance Company*, 14 Grant, 169.

3. *False statement.*

The travelling agent of an insurance company obtained from the plaintiff his application for an insurance, and in filling up the answers to the questions, the question as to the existence of incumbrances was answered in the negative, when in fact a mortgage was in existence on the land on which one of the houses insured stood :

Held, that this circumstance vitiated the policy, not only as to a house situate on the land covered by the mortgage ; but also as to another building standing on land not comprised therein, although separate sums were named in respect of each building. *Bleakley v. The Niagara District Mutual Insurance Co.*, 16 Grant, 198.

At the foot of the paper containing the answers to the several queries propounded by an insurance company, a memorandum was inserted stating that their agents were the agents of the applicants, so far as related to the making of applications, &c., and that the company would not be bound by any statement made to the agent not contained in the application :

Held, that the applicant was bound by a false statement contained in the application, even if the agent had, as was alleged, filled in the answer to the question without putting the question to the applicant. *Id.*

4. *Against partial loss.*

The policy of insurance on a vessel provided that no partial loss or particular average should be paid unless amounting to five per cent. The vessel went on a shoal at Matanzas, but

did not leak immediately, and was thereupon supposed to have received no injury, and the contrary was not discovered until after she had sailed for Europe with a cargo. She touched at Queenstown for orders and thence sailed for Stockholm, where she discharged her cargo and returned to England. On being examined there she was found to have sustained damages exceeding five per cent. The Court being satisfied that the injury was either wholly sustained at Matanzas, or was the immediate and necessary consequence of what occurred there, it was held that the insured was entitled to recover. *Berry v. The Columbian Insurance Company*, 12 Grant, 418.

5. *Insurable interest.*

Where a person bought from a wharfinger 3,500 bushels of wheat, part of a larger quantity, and paid for it, but the wheat bought had not been separated from the rest, it was held that he had no insurable interest in the wheat. *Box v. The Provincial Insurance Company*, 15 Grant, 337.

S. C. on rehearing. 15 Grant, 552, affirmed, Mowat, V.-C., dissenting.

INTEREST.

See EXECUTORS III.—VENDOR AND PURCHASER—BUILDING SOCIETY.

1. A merchant agreed in writing to advance money for the purpose of getting out timber to be forwarded to him at Quebec for sale, for which advances he was to be paid certain commissions. The timber was duly forwarded to him in the autumn; but prices being low, the plaintiff, with the assent of the other party, held the timber over till the following spring, and claimed interest on his advances from the first of December until the sale of the timber, the case not being provided for by the agreement. It appeared that it had been customary in the trade to charge interest in such cases where there was not any writing; but there was no evidence of such custom being known to the plaintiff:

Held, that interest could not be charged (Mowat, V.-C., dissenting). *De Hertel v. Supple*, 14 Grant, 421.

2. When defendant had retained moneys and did not shew that he had deposited them for safe keeping, or kept them in his hands unemployed, he was *held* to be properly charged with interest. *Beaton v. Boomer*, 2 Cham. R. 89.

3. Interest on purchase money runs from the date when, after the acceptance of the title, the purchaser could have safely taken possession, and a difficulty respecting the conveyance may justify his not taking possession. *Rae v. Geddes*, 3 Cham. R. 404.

4. Where the widow of the testator had received more than her proper share of the personal estate, the Court charged her with interest on the excess in administering the estate. *Davidson v. Boomer*, 17 Grant, 509.

5. The Assignee of a person upon whose life a policy of insurance has been effected is not entitled to claim interest on the amount of the policy until he is in a position to give to the assurers a full legal discharge upon payment of the claim. *The Toronto Savings Bank v. The Canada Life Assurance Company*, 14 Grant, 509.

INTERIM ALIMONY.

See ALIMONY.

Interim alimony runs from the time of the service of the bill, if there has been no want of diligence on the plaintiff's part in making the application. *Howe v. Howe*, 3 Cham. R. 424.

INTERNATIONAL LAW.

International Law—Captured postage stamps—Purchase without notice.

On the determination of the Civil War in the United States, the Government at Washington became entitled to the property theretofore belonging to the Confederate Government.

During the war, United States postage stamps to the amount of \$10,500 were taken by a Confederate ship from a United States vessel. There was no condemnation in a Prize Court; nor any transfer of the stamps to any person by the Confederate

Government. After the war was over, these stamps being in possession of an officer of the Confederate ship, were sold by him through a broker to the defendant in Liverpool at a large discount. The defendant alleged that he had bought without notice of any infirmity in the title; but the Court—being satisfied that he bought with knowledge of the facts, or with a strong suspicion of them and designedly avoided inquiry—ordered the stamps to be given up to the United States Government. *The United States of North America v. Boyd*, 15 Grant, 138.

INTERPLEADER ISSUE.

See DIVISION COURT.

Amending, See AMENDING, III.

Amending interpleader issue *nunc pro tunc*. *Mulholland v. Downs*, 2 Cham. R. 233.

Where a married woman claimed goods seized under a *fi. fa.*, and an interpleader order was applied for, it was held that her husband ought to be served with notice of the motion. *Gourlay v. Ingram*, 2 Cham. R. 237.

An order for an interpleader to issue had been applied for to try the right of a married woman to certain goods seized under a *fi. fa.*, to which application her husband was not a party, and the motion was refused with costs. On that application certain depositions or examination of the husband had been put in to shew that the claimant was a married woman, but had not been formally read, the fact not being disputed. On the close of that application the solicitor for the plaintiff took away with him these depositions, and notice having been served on the husband, the motion was renewed and an interpleader order granted by the Secretary, which, on appeal, was sustained. *Gourlay v. Ingram*, 2 Cham. R. 238.

Where on an interpleader issue the amount in dispute was \$60.40 only, a verdict having been given in favour of the claimant, and the Judge of the County Court who tried the issue

having certified that he was satisfied with the verdict, the Court refused a new trial. although they thought that if the case had originally come before this Court for trial on the same evidence, the opinion of the Court might have been against the claimant.

The verdict not having been endorsed on an office-copy of the order of interpleader, but on the record only, the supposed irregularity was *held* to be immaterial.

Where there was a variance between the issue directed by an interpleader order and the issue stated in the record, the latter being the issue which, if asked, the Court would have directed : *Held*, that after trial, no advantage could be taken of the variance. *Gourlay v. Ingram*, 2 Cham. R. 309.

An interpleader suit must be dismissed, with costs, if the plaintiff does not establish, at the hearing, a case making interpleader proper. *Bank of Montreal v. Little*, 17 Grant, 685.

Two writs were in the hands of the Sheriff, and while an interpleader order was pending he was served with a notice to return one of the writs ; and not having done so an application was made to compel him to make a return. Under the circumstances the Secretary enlarged the time for making the return, and made no order for costs.

It is the Sheriff's duty before making application for an interpleader order to make some inquiry as to the nature of the claim, and if he has not done so, he will be ordered to pay costs.

Where an interpleader order is pending the Court will in its discretion enlarge the time for returning writs in the Sheriff's hands. *Walker v. Niles*, 3 Cham. R. 59.

IRREGULARITY.

A notice of motion on grounds of irregularity should state the grounds of the alleged irregularity. *Poole v. Poole*, 2 Cham. R. 379.

JOINT-TENANT.

Although the general principle is that one joint-tenant will not be restrained from committing waste at the instance of his co-tenant, the rule is different where a bill has been already filed for a partition of the estate. *Lassert v. Salyerds*, 17 Grant, 109.

JUDGES.

Three of the Judges in Appeal being members of the Church Society, they held themselves disqualified to sit as judges, except *ex necessitate*, though no objection to their sitting was taken at the bar, but there not being a quorum without them they heard the case with the other Judges, in order that a judgment legal in point of form might be given by the Court. *Boulton v. The Church Society of the Diocese of Toronto* (In Appeal), 15 Grant, 450.

JUDGMENT AND JUDGMENT CREDITORS.

See DISCHARGE OF ONE OF SEVERAL JOINT DEBTORS.

1. A bill was filed by judgment creditors alleging that their debtor was devisee and executrix of her husband ; that she was entitled to an annuity under his will, and was a creditor of his estate for advances she had made to pay his debts, and claiming that these debts and claims should be ascertained, the estate administered, and sufficient land of the testator sold to pay what the estate owed, or so much of it as would cover the judgment debt : *Held*, that the plaintiff was not entitled to relief. *Gilbert v. Jarvis*, 16 Grant, 265.

2. A judgment creditor cannot attach or garnish by means of a suit in equity a debt for which he has not obtained an attaching order at law. *Blake v. Jarvis*, 16 Grant, 295 ; 17 Grant, 201.

3. But, *Semble*, after obtaining and serving such an order, if a remedy in equity is needed for the realization of the debt

so attached, the creditor is entitled to file a bill for the purpose.—*Ib.*

4. A creditor recovered judgment against his debtor, who having afterwards died intestate, the creditor had himself appointed administrator of his estate, and thereupon without suing out execution against lands, filed a bill against the real representatives of the intestate for relief under 13 Elizabeth : *Held*, that the peculiarity of his position as both creditor and personal representative, did not entitle him to relief in this Court, without first suing out execution on his judgment. But the pleadings being sufficient to warrant it, the decree of administration was made with such costs as would have been incurred on taking out the ordinary administration order, the plaintiff paying to the defendants their costs of answer and of the hearing. *Duffy v. Graham*, 15 Grant, 547.

5. A judgment against fraudulent creditors as to part of the sum included therein, is void as against such creditors *in toto*. *The Commercial Bank v. Wilson* (In Appeal), 14 Grant, 473, and 3 E. & A. R., 257.

6. *A.* is the owner of lands and mortgages them to *B. C.*, then registers a judgment against *A.* After the time for payment of the mortgage expires, *A.* conveys absolutely to *B.*, who gives a release of his mortgage and then conveys to *D.* In a suit by *C.* to foreclose under his judgment *D.* claims priority in respect of *B.*'s mortgage over *C.*'s judgment on the ground that the conveyance from *A.* to *B.* was in substance a release of *A.*'s equity of redemption, and that *B.* still held his mortgage against subsequent incumbrances : *Held*, that in the absence of any act manifesting an intention that the mortgage should not be kept on foot, a mortgagee acquiring the equity of redemption would be entitled to such priority, but that the release was strong evidence that there was no such intention here.

7. Where after a mortgage being given the equity of redemption is severed so that different persons are entitled to redeem in respect of different parcels, such persons must be made parties in a suit to foreclose the mortgage. *Buckley v. Wilson*, 8 Grant, 566.

JUDICIAL OPINION.

See Acts.

JURISDICTION.

See ARBITRATION—IMPRISONMENT FOR DEBT—MASTER.1. *In cases involving less than \$200.*

Where creditors whose claims in aggregate were under \$200 obtained the usual administration order, and it was shewn that the value of the estate including lands was under \$800, and although the real estate which it was necessary to sell to satisfy such claims was encumbered by mortgage to an amount which together with those claims exceeded \$200, it was held that the plaintiffs could not reckon the mortgage debt for the purposes of this suit, and therefore that the case was within the jurisdiction of the County Court and the plaintiffs were refused their costs of suit. *In Re Scott, Hetherington v. Stevens*, 15 Grant, 683.

Where the amount in dispute is under \$200 but the defendant is out of the jurisdiction, the plaintiff is entitled to costs on the higher scale. *Skelly v. Skelly*, 18 Grant, 495.

The Court of Chancery has no jurisdiction to give relief to sureties on a recognizance in a criminal proceeding. *Rastall v. The Attorney-General*, 18 Grant, 138.

Where the plaintiff's claim on the premises, together with the amount of a subsequent mortgage, exceeded \$200, it was held to be beyond the jurisdiction of the County Court.

Semble, the necessity for an order for substitutional service would appear to be sufficient reason for not filing a bill in the County Court. *Seath v. Mellroy*, 2 Cham. R. 93.

2. *In cases involving less than £10.*

This Court has no jurisdiction in a case involving a less sum than £10.

Where the Referee dismissed a bill on the ground that the amount involved was only \$24, his order was sustained by the Court in rehearing term. *Gilbert v. Braithwait*, 3 Cham. R. 413.

The Court of Chancery will not entertain a suit where the subject matter of litigation is a sum not exceeding £10.

Where therefore, after default was made in payment under a decree for foreclosure, in a suit in which a bill was filed to enforce a mortgage securing \$18.53, a final order was refused. *Shaw v. Freedy*, 8 U. C. L J., 4 Cham. R., 136.

LACHES.

See GOODWILL—SPECIFIC PERFORMANCE.

LEGACIES CHARGED ON CORPUS.

See WILL.

To Executors—See ADMINISTRATION SUIT.

LEGATEES.

See PARTIES.

LANDLORD AND TENANT.

Fixtures.

1. A greenhouse, conservatory, and hothouse affixed to the freehold, were held not to be removable by a tenant. Also, the glass roofs.

But machinery for heating these houses, which rested by its own weight on bricks, and was not fastened to the freehold, was held to be removable. Also, the pipes passing from the boilers through a brick wall into adjoining buildings. *Gardiner v. Parker*, 18 Grant, 26.

Landlord acting under Power of Attorney.

2. A tenant absconded leaving rent in arrear, whereupon the landlord levied upon the goods of the tenant under a landlord's warrant, but before selling, the tenant sent to the landlord a power of attorney, authorizing him to dispose of the property; and by a letter he directed the landlord to pay himself his claim

for rent, as also his claim for expenses and trouble ; and after payment thereof and of the claim of the plaintiff, to remit the balance to the tenant. Upon receipt of this power the landlord abandoned proceedings under his warrant, and disposed of the property under the power of attorney. In a suit brought by the plaintiff, it was *held* that the landlord by his proceeding under the power of attorney had not waived his right to payment of the rent due by the absconding tenant, and that the plaintiff was entitled to be paid only out of the balance remaining after payment of such rent, as also of any rent due by any former tenant for which a distress could have been made, together with the landlord's expenses and charges for trouble in executing the trusts of the power. *Tyrrell v. Rose*, 17 Grant, 394.

Adoption of lease by Tenant.

3. A person assuming to have an interest in property, though he had none, executed a lease, or an agreement for a lease, to a tenant ; one of the true owners shortly afterwards took an assignment of the instrument, and gave to the tenant notice of the assignment ; and successive owners demanded and received rent reserved by the instrument, insisted on the building of a barn which the agreement provided for, and otherwise recognized the existence of the agreement: *Held*, that the agreement was thereby confirmed and adopted, and was binding on the estate. *Simmons v. Campbell*, 17 Grant, 612.

LAPSE OF TIME.

See VENDOR AND PURCHASER.

Where a plaintiff files a bill praying relief on the ground of a legal title in himself, no shorter lapse of time than would be a bar at law is an obstacle to relief in equity. *Connor v. McPherson*, 18 Grant, 607.

LEASE.

Adoption of. *See* LANDLORD AND TENANT.

1. One of the conditions of a lease was that the lessee (the defendant) should erect a barn of certain specified dimensions, and the land whereon it was to be erected was mentioned, but the lease was silent as to the exact location or site of the barn. The lessee commenced to erect a barn on a site with which the lessor was dissatisfied, who thereupon filed a bill alleging that such site was unsuitable, and that it had been selected by the defendant from improper motives; that another site had been agreed on between them, and that the building itself was faulty in its construction, and prayed an injunction restraining the defendant from allowing the barn to remain in its present position; and by amendment sought to enforce specific performance of the contract. The evidence failed to establish the material allegations of the original bill: *Held*, that by the terms of the lease the plaintiff had not the right of selecting the site of the barn. (2) That it was not a proper case for decreeing specific performance, or to award damages in lieu thereof, but that the plaintiff must be left to his remedy at law. *Campbell v. Simmons*, 15 Grant, 506.

2. *For years, renewable.*

A lease of land for four years, with covenant for renewing for four years more, was *held* not to require registration, actual possession having gone along with the lease; and such a lease though not registered was *held* valid as respects the covenanted renewal as between the lessee and subsequent mortgagees of the lessor. *Latch v. Bright*, 16 Grant, 653.

LEAVE.

To Answer. See ANSWER.

To Rehear. See REHEARING.

To Appeal. See APPEALING.

LEGACIES.

Where amount very small.

Where no letters of administration have been taken out, and

a legatee was entitled to a very small sum, an order was made for payment out of the amount to the solicitors of the legatee without letters of administration, he undertaking to apply it as intended. *Ross v. Ross*, 4 Cham. R., 27.

LETTERS OF ADMINISTRATION.

See ADMINISTRATION.

LETTERS ROGATORY.

Letters rogatory, such as are provided for by an Act of Congress of the United States, as issuable from any foreign Court, will be issued by the Court here, although in the present state of our law no reciprocal accommodation can be afforded here to suitors in the United States.

In letters rogatory so issued here the usual offer to render similar service when required was necessarily omitted.

Such letters need not necessarily be in the name of the Sovereign, but were issued as from the Judge of the Court of Chancery. *United States v. Denison*, 2 Cham. R., 176.

LIEN.

For unpaid purchase money. See VENDOR AND PURCHASER.
Of Solicitor. See SOLICITOR.

The part owner of a British registered ship sold his shares therein on credit to the defendant, *D.*, who having made default in payment of the balance of purchase money, an execution at law was obtained therefor, under which their interest in the vessel was sold by the sheriff to *C.*, another defendant, and a bill was thereupon filed by the vendor claiming a lien on the vessel for unpaid purchase money. A demurrer thereto for want of equity was allowed. *Baker v. Dewey*, 15 Grant, 668.

LIMITATIONS, STATUTE OF.

See LAPSE OF TIME—STATUTE OF LIMITATIONS—MORTGAGE V.
RIPARIAN PROPRIETORS, 3.

In a partnership suit it was held that the defence of the Statute of Limitations could not be raised under the common decree directing an account of the partnership dealings and transactions. *Carroll v. Eccles*, 17 Grant, 529.

Two brothers were owners of land as tenants in common in fee; their father lived with them on the property and was maintained by them. One of the brothers died intestate and without issue, leaving his father his heir; the father continued to live with the surviving brother on the property, and to be maintained by him; the father did not affect to be owner of the property: *Held*, that this living on the property was sufficient to prevent the Statute of Limitations from running against the father, as respected his individual moiety. *Holmes v. Holmes*, 17 Grant, 610.

LIS PENDENS.

The only way of getting rid of a *lis pendens* is to obtain an order dismissing the bill. *Graham v. Chalmers*, 2 Cham. R., 53.

LOCAL MASTERS AND REGISTRARS.

See INFANT, 3.

See 34 VIC. c. 10.

Local Masters and Deputy Registrars of the Court are not at liberty to practise in partnership with solicitors practising in this Court, although they may not actually share in the emolument of suits. *McLean v. Cross*, 3 Cham. R., 432.

LOAN OF FUNDS IN COURT.

The Court will not grant a loan of money except to persons

of undoubted credit, apart from the question of value of security offered.

Where the applicant was a young woman residing with her father the application was refused. *Attorney-General v. Alexander*, 3 Cham. R., 101.

LOWER SCALE OF COSTS.

The costs of a suit by a judgment creditor, to whom less than \$200 is due, to obtain payment of his own debt alone out of property alleged to have been conveyed away to defeat the plaintiff's claim, are taxable according to the lower scale, no matter what the value of the property may be. *Forrest v. Laycock*, 18 Grant, 611.

LOSSES, DIVISION OF.

See PARTNERSHIP.

LUNACY AND LUNATICS.

- I. CHANGING CONDUCT OF ORDER.
- II. AVOIDING TRANSACTIONS ON GROUND OF LUNACY.
- III. COMMITTEE GUILTY OF NEGLECT.
- IV. MISCELLANEOUS CASES, &C.

I. CHANGING CONDUCT OF ORDER.

In June 1864, the committee of a lunatic's estate applied for and obtained an order for the sale of lands for the payment of debts reported due by the lunatic ; instead of proceeding to realize the estate, the committee took no action whatever under the order, and in 1868, after a delay of nearly four years, certain of the creditors applied for the conduct of the order directing the sale of the lands, and the Court under the circumstances made the order. In *Re Shaw*, a lunatic, 14 Grant, 524.

II. AVOIDING TRANSACTION ON GROUND OF LUNACY.

Where amongst other delusions, a vendor, who was insane, imagined that he was bewitched, and it was proved that the purchaser learned this from conversation with the vendor during the negotiation for the purchase, and that the purchase money was only one half the sum which the seller had previously been offered and might have obtained from another person, the transaction was set aside. *McDonald v. McDonald*, 14 Grant, 545.

III. COMMITTEE GUILTY OF WILFUL NEGLECT AND DEFAULT.

The committee of a lunatic's estate having neglected to collect rent of a tenant whom he found in possession of a portion of the estate, was charged with the amount thereof on passing his accounts.

The committee of a lunatic's estate expended more money in making surveys and roads, with a view to a sale of a portion of the estate, than the Court had authorized, and which excess of expenditure was occasioned by the failure of a neighbouring proprietor, who had agreed to contribute towards such expenditure. On appeal from the master disallowing such excess, it was considered that as the Court will, under certain circumstances, sanction some expenditure, even though made without authority, if done for the benefit of the estate, and the expenditure was such as would have been authorized at the time, directed the amount to be allowed him on passing his accounts.

The powers, duties and liabilities of a committee of a lunatic's estate considered and acted on. In *Re Shaw*, a lunatic, 15 Grant, 619.

IV. MISCELLANEOUS CASES RELATING TO SUBJECT.

1. The recognizance of the committee of a lunatic or of a receiver will not be deemed sufficient security under the statute. *Re Ward*, 2 Cham. R. 188.

2. Where the heir-at-law or next of kin of a lunatic are unknown, or reside at a distance, and service on them would be attended with great expense, the Court may, in a proper case, dispense with service of notice on them. *Re McGrath*, 2 Cham. R., 435.

3. Notice of motion to declare a person a lunatic and to apply the estate of an alleged lunatic to his maintenance, &c., in a lunatic asylum, should be served on the lunatic personally, if it is practicable to do so, without danger to his health or state of mind. Where, therefore, a notice of such a motion had not been served, on the ground that doing so would be useless in consequence of the state of the alleged lunatic, the Secretary directed that some medical man, other than the physician of the asylum, should visit the asylum and give evidence as to the state of the lunatic, and whether service could be effected on him. *Re Mein*, 2 Cham. R., 429.

4. On an application to declare a person a lunatic without commission, an affidavit by an officer of a lunatic asylum that the alleged lunatic is in such a state of mind as that service on him would be dangerous and prejudicial to him, will not be held sufficient to dispense with personal service on him.

Where, however, such affidavit was corroborated by others, and it was evident the party was a dangerous lunatic, personal service on him was dispensed with. *Re Newman*, 2 Cham. R., 390.

5. The Court will exercise a wide discretion as to the disposition of lunatic's estates, and when it appears to be necessary for the benefit of the estate will order its sale and disposition, and authorize the committee to collect rents, &c. *Re Keenan*, 2 Cham. R., 492.

6. The control of the Court ceases with the death of the lunatic, and an order for the distribution of a lunatic's estate will not be made under proceedings in lunacy.

Under such circumstances the committee of a lunatic took under authority of the Court proceedings for the administration of the estate of a deceased lunatic, by applying for an administration order, which was granted; the proceedings being directed to be as inexpensive as possible. *Re Brillinger*, 3 Cham. R., 290.

7. On an application by the Bursar of the Provincial Lunatic Asylum for moneys in Court belonging to a lunatic party in a suit, in which his property had been sold: *Held*, that such application was not authorized by the statute: Consol. Stat. U. C. cap. — *Mein v. Mein*, 3 Cham. R., 62.

MAGISTRATES.

Magistrates, where interested. See DEED, VIII.—MARRIED WOMAN, II.

MAINTENANCE.

See INFANT IV.—CONSTRUCTION OF WILL.

Charged on annual profits. See WILL.

Double. See WILL.

MARRIAGE SETTLEMENT.

See CONVEYANCE IV.

A widower, on his second marriage, executed a settlement which made provision for his children by his first marriage: *Held*, [affirming the decree of the Court below,] that the provisions could not be defeated by a sale for value by the settlor. *McGregor v. Rapelje*, 18 Grant, 446.

MARRIED WOMAN.

Appeal by. See APPEAL. See DEED, VIII.—EXECUTORS, I.—HUSBAND AND WIFE—QUIETING TITLES, 21.

I. DECREE AGAINST.

II. DEEDS BY.

III. MORTGAGES BY.

IV. SEPARATE ESTATE.

V. MARRIED WOMAN'S ACT.

VI. EXAMINATION OF.

VII. GENERALLY.

I. DECREE AGAINST.

A conveyance void against creditors was made through a third party to the owner's wife; the husband afterwards became insolvent and joined his wife in a sale of the property to a purchaser without notice; a conveyance to the purchaser was executed and registered, and the purchaser gave to the wife a mortgage for part of the purchase money, and paid her the residue in cash. On a bill by the assignee in insolvency he was declared entitled to the mortgage, and to any of the money which still remained in the wife's hands, and to any property, real or personal, which she had purchased with the residue and still owned; but the Court refused to direct an inquiry as to whether she had separate estate, in order to charge the same with any of the residue which had been spent by her. or with the costs of the suit. *Saunders v Stull*, 18 Grant, 590.

II. DEEDS BY.

The solicitor of the husband being City Recorder, was held not to be disqualified to take, as a magistrate, the examination of a married woman for the conveyance of her land. [SPRAGGE, C., *dubitante*.] *Romanes v Fraser*, 17 Grant, 267.

Magistrates interested in the transaction are not competent to take the examination of a married woman for the conveyance of her land. The solicitor of the husband is not as such disqualified.—*Ib*.

Where, after the decease of one of the Justices of the Peace by whom an examination was taken, the other, an old man of seventy-three, gave evidence that he did not recollect and did not believe that the wife was examined as the certificate stated, the Court gave credit to the certificate notwithstanding the evidence.—*Ib*.

III. MORTGAGES BY.

Two mortgages on property of a married woman executed by her and her husband, in manner required by the statute in that behalf, were impeached by her for want of the evidence necessary in equity to sustain gifts: *Held*, that as the mortgages

had been given for valuable consideration, and the mortgagee had been guilty of no fraud in obtaining them, they were valid securities. *Mulholland v. Morley*, 17 Grant, 293.

IV. SEPARATE ESTATE.

A married woman who has separate estate which is vested in trustees cannot on that account be sued for a legal debt contracted before her marriage. In such a case a creditor has no *locus standi* in equity until he has obtained judgment at law. *Quære*, whether a married woman has any and what *jus disponendi* in respect of her personal property under the Married Woman's Act (Consolidated Statutes of Upper Canada, ch. 73). *Chamberlain v. McDonald*, 14 Grant, 447.

A married woman who was equitably entitled as *cestui que trust* to a life estate in certain lands, joined with her husband in making a promissory note upon which judgment was recovered against them. Thereupon the plaintiff in the action filed a bill in this Court seeking to enforce his claim against the title of the wife: *Held*, that the provisions of the Married Woman's Act had not the effect of increasing the interest of the wife, so as to render her estate liable for this debt. *Royal Canadian Bank v. Mitchell*, 14 Grant, 412.

V. MARRIED WOMAN'S ACT.

The Married Woman's Act does not exempt personal property of a wife who was married on or before the 4th May, 1859, from liability for debts contracted by the husband before that date. *Fraser v. Hilliard*, 16 Grant, 101.

Where a wife who was married before the 4th May, 1859, purchased after that date property in her own name, and paid for it (as was alleged) with money theretofore given to her by her son, it was *held*, as between her and a creditor of her husband, whose debt was contracted before the 4th May, 1859, that money so given to the wife became instantly her husband's money, and that the land bought with it was liable to the creditor.—*Id.*

VI. EXAMINATION OF.

Where it would be attended with inconvenience to have a married woman examined by the Court or Judge, touching her consent to abandon her interest in the fund in litigation; the examination may be taken by the Master. *Tompkins v. Holmes*, 14 Grant, 245.

VII. GENERALLY.

A married woman, living apart from her husband, accepted some property for her wages: *Held*, that the transaction was binding on the grantor, and all claiming under him. *Moore v. Davis*, 16 Grant, 224.

An application for an order to serve a married woman as if a *feme sole*, and for an order for substitutional service upon her for her husband who could not be found, was refused, he not being shewn to be out of the jurisdiction. *Meyers v. Barker*, 2 Cham. R., 407.

MASTER.

Appealing from. See APPEALING, III.

I. HIS JURISDICTION, DUTIES AND POWERS GENERALLY.

1. Allowance not directed.
2. Wilful default.
3. Must decide questions referred.
4. Jurisdiction.
5. Settling conveyance.
6. Proceeding on warrant.
7. Evidence
8. Finding on conflicting testimony.

II. MASTER'S REPORT.

III. " CERTIFICATE.

I. HIS JURISDICTION, DUTIES AND POWERS GENERALLY.

1. Allowance not directed.

The Master has no authority to make an allowance not directed by the decree, however reasonable it may appear to him to be: his proper course is to report the circumstances specially; and the party claiming to be entitled can apply to the Court on further directions. *Fielder v. O'Hara*, 2 Cham. R., 255.

2. *Wilful Default.*

Under a decree for account, it is the duty of the Master to find whether a defendant is or is not chargeable as for wilful default, if the question arises without any directions in the decree to that effect. Where, therefore, a Master reported only that rents and profits had come to the hands of the defendant, and after stating a number of facts, submitted to the Court whether he should or should not be charged, the matter was referred back to him to complete his report. *Walmsley v. Bull*, 2 Cham. R., 344.

3. *Must decide questions referred.*

It is not competent to a Master to abstain from deciding any question, properly coming before him for his decision. *Ib.*

4. *Jurisdiction.*

The Master has jurisdiction in matters in his own office, and will not be interfered with on a motion in Chambers. An order to be directed to him to deliver up books, &c., in his hands was refused. *Nelson v. Gray*, 2 Cham. R., 454.

5. *Settling Conveyance.*

Where it had been referred to the Master "to settle the conveyance or conveyances to the purchaser or purchasers, and all proper parties are to join therein, as the Master shall direct," and the Master did not, in settling the conveyance, direct that an infant, whose lands had been sold, should be made a party, but merely that her guardian should; and subsequently, after such infant had married, directed that she, being still an infant, and her husband should join in a new conveyance, which was done; it was held that this was within the Master's powers, and

was in effect as if the Court had directed the execution of the conveyance under 12 Vic. ch. 72, and that the deed was binding and passed the estate. *Rae v. Geddes*, 3 Cham. R., 404.

6. *Proceeding on Warrant.*

A warrant should be so underwritten as to explain clearly what proceedings are intended to be taken under it ; and if proceedings are taken of which the warrant gives no notice, or which are inconsistent with the underwriting, in the absence of parties interested, and who might if present have opposed them, such proceedings will be set aside and the benefit of them refused to the parties so irregularly proceeding.

Where a warrant was underwritten "to settle advertisement for sale of the balance of the unconverted assets of the estate," and without further warrant the Accountant directed that an offer for certain bonds of the estate be accepted, and the purchaser, a party interested under the will, made a profit on such purchase,—the Master upon the question being submitted to him, declared such profits of the sale to belong to the general estate. *Denison v. Denison*, 3 Cham. R., 349.

The Master will proceed upon his warrant, though the order of reference obtained *ex parte* be not served, so long as the warrant is not moved against. As to when cost of the day will be granted. *Re S. S. MacDonnell*, 8 U. C. L. J., 4 Cham. R., 85.

7. *Evidence.*

The Court will not interfere with the discretion of the Master in deciding on the relative veracity of witnesses, where evidence has been taken *viva voce* before him.

Where the Master refused to open a case where the evidence was closed, on the ground that the applicant had not made such a case as entitled him to a new trial at law ; the Court sustained his ruling. *Waddell v. Smyth*, 3 Cham. R., 412.

Under a general administration decree, the Master may, without any special direction, take evidence as to payments by executors for the maintenance and education of infants, out of

their shares of capital, and report the facts. *Stewart v. Fletcher*, 16 Grant, 235.

8. *Finding on conflicting Testimony.*

Where the evidence given before a Master is conflicting, his judgment on it is, in general, accepted by the Court as correct : and not to be reviewed on appeal. *Day v. Brown*, 18 Grant, 681.

Masters should be careful not to attach too much weight to oral testimony in opposition to evidence of facts and circumstances. *Ib.*

II. MASTER'S REPORT.

It is inconvenient and objectionable for a Master to set forth the evidence in his report, instead of adjudicating thereon. *Sovereign v. Sovereign*, 15 Grant, 559.

A report, like a decree in equity, or the entry of a judgment at law, should state results only, and should not set forth the evidence, arguments, or reasons on which the conclusions are arrived at. Where a decree directs the Master to state his reasons, they should be stated briefly. It is not proper, in an administration suit, to append to the report a copy of the will. *McCargar v. McKinnon*, 15 Grant, 361.

III. MASTER'S CERTIFICATE.

A Master's certificate should follow as nearly as possible the accustomed form ; where it does not, it will be assumed that the Master means to report specially. *Sutherland v. Rogers*, 2 Cham. R., 191.

MEMORIAL.

See QUIETING TITLES.

MERGER.

See PRIORITIES.

MILL DAMS.

See PAROL AGREEMENT—RIPARIAN PROPRIETORS.

MINING COMPANY.

M. was aware of a valuable mining location on Lake Superior, and was regarded by other explorers in that region as entitled to it.

He made known this location to an incorporated Mining Company, under an agreement that he should be compensated for the communication; but the mode of compensation was not determined. The communication having proved valuable to the company, it was held that *M.* was entitled to compensation in the manner usual in such cases.

The usual mode was proved to be, by receiving a share or partnership interest in the mine, when the patent is procured: *Held*, that this mode was not *ultra vires* of the company or the directors. *McDonell v. Upper Canada Mining Company*, 15 Grant, 179.

Since affirmed by the three judges on a re-hearing. *SPRAGGE, V.C.* concurring in the reasons given by *MOWAT, V.C.*, and the Chancellor doubting. 15 Grant, 551.

MIXED FUND.

See WILL.

MONEY IN COURT.

See BUILDING SOCIETY—CANAL—CONVEYANCE—EVIDENCE—
LOAN.

MORTGAGE—MORTGAGEE—MORTGAGOR.

I. DECISIONS AFFECTING THE RIGHTS, POWERS AND LIABILITIES
OF MORTGAGEES, AND RELATIVELY AND INCIDENTALLY THOSE
OF MORTGAGORS.

1. *Mortgage of Railway Company.*
2. *Administration.*
3. *Right to have insurance money laid out in rebuilding.*
4. *Liable to interest if he wants redemption.*

5. *Right to retain Interest.*
6. *Onus of Proof.*
7. *Registry Laws, Possession.*
8. *Vendor and Purchaser.*
9. *Rests.*
10. *Deficiency.*
11. *Costs, Construction of inconsistent expression.*
12. *Production.*
13. *Arrears of Interest.*
14. *Dower.*
15. *Parol Evidence.*
16. *Possession, Notice, Registration, Evidence, Costs.*
17. *Loss of Mortgage Deeds—Costs.*
18. *Tender of Debt.*
19. *Mortgagee's Lien.*
20. *Derivative Mortgagee.*

II. DECISIONS AFFECTING THE RIGHTS AND LIABILITIES OF MORTGAGORS, AND INCIDENTALLY THOSE OF MORTGAGEES.

1. *Redemption of part.*
2. *Executor in double capacity—Loan to Executor.*
3. *Purchase with assent of Mortgagor.*
4. *Notice.*
5. *Costs of action.*

III. REDEEMING AND FORECLOSING, AND THE RIGHTS OF PARTIES INCIDENT THERETO.

1. *Opening foreclosure—Costs.*
2. *Widow claiming to redeem.*
3. *Two mortgages for portion of loan.*

IV. PRIORITIES BETWEEN ENCUMBRANCERS.

1. *Power of sale—Purchaser.*
2. *Priorities.*

V. MORTGAGE BY ABSOLUTE DEED.

1. *Sale by Sheriff of equity of redemption—Dormant equities—Statute of limitations—11th clause, Chancery Act.*

2. *Costs.*
3. *Evidence.*
4. *Parties.*
5. *Parol evidence.*
6. *Subject generally.*

VI. SALES UNDER POWER OF SALE, UNDER DECREE OF SALE
AND PURCHASERS THEREUNDER.

1. *Sales where heirs of Mortgagor unknown.*
2. *Purchase for Mortgagee under power of sale.*
3. *Powers of sale.*
4. *Improvements by purchaser under void sale—Arrears of Interest.*

VII. MISCELLANEOUS CASES AFFECTING THE SUBJECT GENER-
ALLY, AND RELATING INCIDENTALLY TO THE MATTERS SHEWN
BY THE HEADING.

1. *Fire Insurance.*
2. *Mortgage payable without interest.*
3. *Equitable interest in leasehold lands—Merger—Rectory lands.*
4. *Fraud on creditors.*

I. DECISIONS AFFECTING THE RIGHTS, POWERS AND LIABILITIES
OF MORTGAGEES, AND INCIDENT THERETO OF MORTGAGORS.

1. *Mortgage of Railway Company.*
2. *Administration.*
3. *Right to have insurance money laid out in rebuilding.*
4. *Liable to interest if he wants redemption.*
5. *Right to retain Interest.*
6. *Onus of Proof.*
7. *Registry Laws, Possession.*
8. *Vendor and Purchaser.*
9. *Rests.*
10. *Deficiency.*
11. *Costs, Construction of inconsistent expression.*
12. *Production.*
13. *Arrears of Interest.*

14. *Dower.*
15. *Parol Evidence.*
16. *Possession, Notice, Registration, Evidence, Costs.*
17. *Loss of Mortgage Deeds—Costs.*
18. *Tender of Debt.*
19. *Mortgagee's Lien.*
20. *Derivative Mortgagee.*

I. (1) *Mortgage of Railway Company.*

A mortgagee or judgment creditor of a Railway Company is not entitled to enforce payment of his demand by sale or foreclosure of the railway : he is only entitled to have a manager or receiver of the undertaking appointed : and *Quere*, whether the rule is otherwise in the case of a vendor seeking to enforce his lien for unpaid purchase money. *Galt v. The Erie and Niagara Railway Company*, 14 Grant, 499.

I. (2) *Administration.*

A testator devised all his real estate to a mortgagee thereof, charged with a legacy in favour of an infant, and bequeathing legacies to other persons. The mortgagee filed a bill claiming to have the sums appropriated as legacies applied to the payment of his mortgage debt : *Held*, that he was not entitled to be paid out of the personalty in preference to the legacies ; but that he was entitled to be paid his mortgage debt out of the property so devised to him before the sums charged thereon for legacies were raised. *Ricker v. Ricker*, 14 Grant, 264.

I. (3) *Right to have insurance money laid out in rebuilding.*

Where a mortgage contains no covenant on the part of the mortgagor to insure, but he does insure, and a loss by fire occurs whereby the insurance money becomes payable, the mortgagee is entitled under the Act (14 George III., ch. 78, sec. 83) to have the insurance money laid out in rebuilding. *Stinson v. Pennock*, 14 Grant, 604.

I. (4) *Liable to interest if he resists redemption.*

If a mortgagee retains possession of the property after being

paid in full, the general rule is to charge him with interest and rests in respect of his subsequent receipts. *A fortiori* is such a charge proper where a mortgagee resists the mortgagor's right to redeem. *Crippen v. Ogilvie*, 15 Grant, 568.

I. (5) *Right to retain interest.*

A mortgagee sold the mortgaged property under a power of sale: *Held*, in a suit by the mortgagor for the surplus, that the mortgagee was entitled to retain arrears of interest for more than six years. *Ford v. Allen*, 15 Grant, 565.

I. (6) *Onus of proof.*

The decree directed a reference to the Master at Brantford to take an account of the amount due upon the mortgage in question. The only evidence before the Master besides what was used at the hearing of the cause, was the affidavit of the personal representative of the mortgagee, which stated that he believed the whole amount to be due. An appeal from the Master's report finding the whole amount due was allowed. *Seemle*, that the onus of proof under such a reference rests upon the holder of the mortgage. *Elliott v. Hunter*, 15 Grant, 640.

I. (7) *Registry Law—Possession.*

In 1831 *A* demised his farm to his widow in fee, and left her in possession. The will was never registered; and shortly after the testator's death his eldest son and heir went into possession with his mother, and so continued until his mother's death in 1854, the son managing the farm, and being reputed owner during this period. After his mother's death he was in sole possession; and in 1862 he executed a mortgage on the property to a person who had no notice of the will or of the widow's title: *Held*, (affirming the decree of the Court below) that the widow's heirs could not claim the property against the mortgagee. (A. WILSON, J., dissenting.) *Stephen v. Simpson*, (In Appeal.) Affirming—12 Grant; 493, 15 Grant, 594.

I. (8) *Vendor and Purchaser.*

A and *B* mortgaged to *C*, and afterwards sold and conveyed the same property to *D*, receiving back a mortgage for the pur-

chase money, which exceeded the amount due *C*. *A*, without *B*'s authority, assigned this mortgage to *C* by way of further security for the debt due to him by *A* and *B*. On a bill by *B* against all parties, it was *held* that the proper decree was the same as if the purchaser had been the original owner, and had executed a first mortgage to *C* and a second mortgage to *A* and *B*. *Grahame v. Anderson*, 15 Grant, 189.

I. (9) *Rests*.

Wherever, from the necessities of his position, it is necessary that a mortgagee should, for his own protection, take possession, he is not chargeable with rests, and this even though the mortgage was not in arrear. *Gordon v. Eakins*, 16 Grant, 363.

A tenant of a mortgagor paid the mortgage after the mortgagor's death, and the representatives of the mortgagor having no means of paying the debt, he entered into an agreement with the widow that she and her children should occupy the dwelling house and four acres of the mortgaged property; that he himself should occupy the residue at a rental of \$170, should pay \$40 a year to the widow, and apply the residue of the rent on the mortgage: *Held*, in a suit afterwards brought by a purchaser of the equity of redemption to redeem, that the defendant was not chargeable with the \$40 a year he had paid to the widow, nor with rests, though the rent for which he was accountable exceeded the interest. *Ib*.

I. (10) *Deficiency*.

Where, after the mortgagor had assigned his equity of redemption, the mortgagee, with the concurrence of the assignee, by sale and transfer of the mortgaged premises, put it out of his power to reconvey on redemption by the mortgagor, it was *held* that he could not call upon the mortgagor for payment of any deficiency resulting upon such sale of the estate. *Burnham v. Galt*, 16 Grant, 417.

Mortgagees, in pursuance of a power of sale contained in their conveyance, sold the mortgaged property to *McLeod* for \$7,800, and gave him possession. *McLeod* paid a deposit of \$600, and

gave his promissory note for \$600 more, which he duly paid. He also executed a mortgage for \$4,000, which was duly registered, but did not pay the residue of the purchase money, \$2,600. The mortgagees executed a deed of the property but retained it in their possession. The solicitor for the mortgagees also did some acts as if the sale was complete, but the Court, being satisfied that in the contemplation of the parties, the transaction was still *in fieri*: *Held*, that the mortgagees were not responsible to a subsequent incumbrancer for the \$2,600, or chargeable with more money than they had actually received. *The Bank of Upper Canada v. Wallace* [In Appeal], 16 Grant, 280.

I. (11) *Construction of inconsistent expressions—Costs.*

A mortgage dated 16th October, 1866, provided for the payment of the principal in three years from that date; and interest meanwhile at twelve per cent. half yearly, on the 16th of April and October in every year; and declared that to secure prompt payment of said interest the mortgagee would take at the rate of ten per cent. if the interest was paid on the said 17th day of April and October respectively: it was *held*, that the first reference to the day being unequivocal must govern; that the interest was due on the 16th; and not having been paid then, that a bill on the 17th was not irregular. *Bennett v. Foreman*, 15 Grant, 117.

A mortgagee has a right to file a bill of foreclosure the day after the mortgagor makes default; and, though such a course may be extremely sharp, he cannot be refused his costs. *Ib.*

Costs.

A first mortgagee is entitled as against the owner of the equity of redemption to add to his debt the costs necessarily incurred in a suit to redeem, which was brought by a second mortgagee, and was dismissed with costs for the default of the plaintiff therein. *McKinnon v. Anderson*, 17 Grant, 636.

But where a first mortgagee had taken a decree for dismissal on the plaintiff's default, instead of giving the owner of the equity of redemption a day to redeem under the General Order

466, and a second suit became necessary in consequence, he was held not to be entitled to the extra costs thereby occasioned.—*Id.*

I. (12) *Production.*

A mortgagee is not bound to produce his mortgage deed for the inspection of the mortgagor, when there is no question of title in dispute. *Bell v. Chamberlen*, 3 Cham. R., 429.

I. (13) *Arrears of interest.*

During the lifetime of a mortgagor the mortgagee has no lien on the mortgaged property for more than six years' arrears of interest; though he may have a personal action on the covenant for more; but, in this country as well as in England, after the mortgagor's death the mortgagee to avoid circuitry may, as against the heirs, tack to his debt all the interest recoverable on the covenant. *Carrol v. Robertson*, 15 Grant, 173.

A mortgagee is not obliged to accept payment of the whole principal and interest of a mortgage on which only certain interest is due, and a bill to foreclose which has been filed. *Green v. Adams*, 2 Cham. R., 134.

I. (14) *Dower.*

Where a woman joins in a mortgage to bar her dower for the purpose of securing a debt of her husband, and after his death the property is sold for more than is sufficient to satisfy the claim of the mortgagee, the widow will be entitled to have her dower secured out of the surplus in preference to the simple contract creditors of her husband. *Sheppard v. Sheppard*, 14 Grant, 174.

I. (15) *Parol evidence.*

A mortgagee, who was purchasing a prior mortgage, was advised by his solicitor to take the assignment to another person as trustee; and he took the assignment accordingly in the name of his son, not intending it as an advancement to the son: *Held*, that parol evidence was admissible to prove the trust.


Having afterwards foreclosed all other incumbrancers, the same party was advised to release his interest to his son, so that the whole title might be in him as trustee. The deed did not mention any trust, but was retained by the father in his own possession, and was not communicated to the son, who knew nothing of it for more than five years, during all which time the father was receiving payments from the mortgagor to the father's own use, with the knowledge of the son and without any claim by him : *Held*, that parol evidence was admissible to prove these facts, and a conveyance to the father was decreed. *Barr v. Barr*, 15 Grant, 27.

I. (16) *Possession—Notice of Title—Registration—Evidence—Costs.*

The rule that possession is notice of the title of the party so in possession considered and acted on.

The plaintiff purchased the land in question from *J*, who had purchased from *G*, no conveyance having been made to *J* by *G*, who afterwards conveyed the same land to *S*, a son of the plaintiff, who mortgaged it and represented the property as his own, the plaintiff being all the while in possession. The title was not a registered one : *Held*, that the mortgagees were affected with notice of the plaintiff's title by reason of his possession, although there was no pretence of actual notice to them ; and they having omitted to set up the registry laws as a defence, liberty was given them to apply for leave to do so, if so advised. *Gray v. Couch*, 15 Grant, 419.

I. (17) *Loss of Mortgage Deeds—Costs.*

Where a mortgagee loses the mortgage deed he is bound at his own expense to furnish the mortgagor with such evidence of the loss as the mortgagor may require to produce in future dealings respecting the property, and with an indemnity against any demands third persons may have acquired, by deposit of the deed or otherwise to the money or any part thereof. 

After the loss of a mortgage deed, the mortgagor offered to pay the overdue interest on an affidavit being produced that the

mortgagee had not parted with the mortgage. The affidavit was produced accordingly, but the mortgagor did not make the payment, and a bill of foreclosure was filed in respect of this and subsequent defaults. The Court *held*, that the plaintiffs must bear the expense of the proof of loss, and the expense of the indemnity bond, but were entitled to the other costs of the suit. *McDonald v. Hime*, 15 Grant, 72.

I. (18) *Tender of debt.*

Where a tender of debt and interest had been made to a mortgagee, pending actions on the mortgage, and the mortgagee's solicitor sent to the mortgagor's solicitor his bills of costs incurred in the suits, and the latter considered them too large, but offered to pay any amount which the Master should tax, it was *held*, that the mortgagee was entitled, as a matter of strict right, to go on with his actions notwithstanding such offer. *Totten v. Watson*, 17 Grant, 233.

I. (19) *Mortgagee's lien.*

Where the mortgagee's right to claim a lien on the unsold portion has been put an end to, it is not revived by his two years afterwards obtaining the consent of the first purchaser to a reconveyance on payment of the mortgage money. *Cowland v. Garbutt*, 13 Grant, 578.

I. (20) *Derivative Mortgagee.*

A bargain for extra interest made between a derivative mortgagee and a mortgagor inures to the benefit of the original mortgagee. *Graham v. Anderson*, 15 Grant, 189.

II. DECISIONS AFFECTING THE RIGHTS OF MORTGAGORS, AND INCIDENT THERETO OF MORTGAGEES.

1. *Redemption of part.*
2. *Executor in double capacity—Loan to Executor.*
3. *Purchase with assent of Mortgagee.*
4. *Notice.*
5. *Costs of action.*

II. (1) *Redemption of part.*

Where a mortgage provided that in case of sales by the mortgagor of portions of the mortgaged property, the mortgagee, on receipt or tender of a certain proportion of the purchase money, should release the part sold from the mortgage; it was held, that the first person who thereafter purchased and paid to the mortgagor his purchase money, but obtained no release from the mortgagee, was not entitled, as he would have been in the absence of this provision, to pay off the whole mortgage, and to demand payment of the whole from a subsequent purchaser redeeming him; but that each purchaser (including the first) was entitled to redeem his own part on payment of the stipulated proportion of money. *Davis v. White*, 16 Grant, 312.

II. (2) *Executor in double capacity—Loan to executor.*

A mortgagee appointed the mortgagor one of his executors, and the mortgagor became the acting executor; the mortgagor afterwards entered into an agreement with *B*, the owner of other property, for an exchange free from incumbrances, and that *B* should pay \$2,000 for the difference in value; the mortgagor had indorsed on the mortgage certain sums as paid by him thereon after the mortgagee's death, reducing thereby the amount appearing to be due on the mortgage to \$1,600, no part of which, however, was payable: *B* satisfied the \$1,600, partly in money paid to the mortgagor, partly by a debt owing to *B* by the mortgagor, and partly by moneys which had theretofore been lent by *B* for the purposes of the mortgagee's estate, and the mortgagor thereupon indorsed on the mortgage a receipt for \$1,600 in full of the mortgage money: the contemporaneous payment of money was with the assent of the other executor. It afterwards appeared that the mortgagor was largely indebted to the mortgagee's estate at the date of all these transactions: Held, that the contemporaneous payment was a valid payment *pro tanto*, the same having been made with the assent of the co-executor; but that the estate or the co-executor was not bound by the receipts indorsed on the mortgage; and that *B* was not entitled to credit, as against the estate, for the private debt due

to him by the mortgagor, nor for his antecedent loan. *Bacon v. Shier*, 16 Grant, 485.

II. (3) *Purchase with assent of Mortgagee.*

K was trustee for sale of certain lands belonging to M. Two parcels were subject to a mortgage to the Bank of Upper Canada for more than the value thereof. The trustee agreed for the sale of these parcels to a purchaser; the Bank, before becoming insolvent, assented to the sale, and received the first instalment of the purchase money. The purchaser went into possession, but was in default in paying purchase money: the defendants were his assigns. By the trust deed, which the Bank executed on becoming insolvent, (which deed was afterwards confirmed by statute,) it was made the duty of the Bank trustees to accept in payment and liquidation of any debt due to the estate the notes or bills of the Bank: on a bill by the Bank trustees for payment, it was *held*, that as the money was coming to the Bank, the trustees were bound to accept payment in the notes of the Bank at par. *The Trustees of the Bank of Upper Canada v. The Canadian Navigation Co.*, 16 Grant, 479.

II. (4) *Notice.*

A mortgagor sold one of several mortgaged parcels, and the purchaser went into possession; the mortgagees afterwards, having no notice of the sale, released the other parcels to the mortgagor, retaining the mortgage on the ~~old~~ sold parcel; upon which the purchaser of the parcel filed a bill to have it declared that by the release his parcel was discharged from liability for the mortgage: *Held*, that he was not entitled to such relief; and that, not having offered to redeem, his bill should be dismissed with costs: but, the defendants having prayed a foreclosure in default of payment, a decree to that effect was pronounced. *Beck v. Moffat*, 17 Grant, 601.

II. (5) *Costs of action.*

A mortgagor who desires to stay an action brought against him by the mortgagee, cannot insist on the mortgagee's taxing his costs and staying the suit meanwhile, on the promise of

the mortgagor to pay the amount when taxed. *Nixon v. Hunter*, 17 Grant, 96.

III. REDEEMING AND FORECLOSING—AND THE RIGHTS OF PARTIES INCIDENT THERETO.

1. *Opening foreclosure—Costs.*
2. *Widow claiming to redeem.*
3. *Two mortgages for portion of loan.*

III. (1) *Opening foreclosure—Costs.*

L and *S* were joint owners of certain lands, and *L* had created a mortgage on a part of his undivided interest, in favour of *R*. With the view of effecting a partition, *L* conveyed his interest to his co-tenant *S*, who thereupon re-conveyed to *L* a certain defined portion; and in order to protect *S* against the mortgage outstanding in *R*'s hands, *L* executed back to *S* an indemnity mortgage: *L* did not pay off *R*'s mortgage; and *R* having obtained a final decree of foreclosure, sold his interest in the property to *S*. *L*, after the petition, had sold a portion of the estate to the plaintiffs, who in respect of their interest had been made parties to the foreclosure suit by *R*. Subsequently in an action of ejectment *S* set up title under the indemnity mortgage from *L*: *Held*, that he had thus let in the plaintiffs to redeem, who were entitled to do so upon paying what *S* had paid or was liable to pay to *R*, and all expenses reasonably incurred, together with costs as of an ordinary redemption suit—beyond those *S* was ordered to pay the costs. *Read v. Smith* (In Appeal), 16 Grant, 52.

III. (2) *Widow claiming to redeem.*

The owner of property mortgaged it, and then died, having devised one-half the property to one son, and the other half to another, charging each half with an annuity to the testator's widow. One of the sons afterwards died intestate, and his widow paid off the mortgage, and took an assignment to herself: *Held*, that the one annuity not being in arrear, and the assignee of the mortgage being willing to pay the arrears of the other annuity, the testator's widow could not insist on redeeming the mortgage. *Long v. Long*, 16 Grant, 239.

Held, that if she was willing to make the annuity a first charge on the property, the testator's widow could not insist on redeeming the mortgage. S. C. on rehearing, 17 Grant, 251.

III. (3) *Two mortgages for portion of loan.*

A lent *B* \$2,000 and took two mortgages from the borrower each for \$1,000 on separate property. The mortgagee foreclosed one of the mortgages and then parted with the property: *Held*, no bar to a foreclosure of the other mortgage. *Bald v. Thompson*, 16 Grant, 177.

IV. PRIORITIES BETWEEN INCUMBRANCERS.

1. *Power of sale—Purchaser.*
2. *Priorities.*

IV. (1) *Power of sale—Purchaser.*

If a first mortgagee with a power of sale proceeds to a sale of, and sells the mortgage premises to a *puisne* incumbrancer, the purchaser thereby acquires an irredeemable interest as against the mortgagor, and the effect would be the same notwithstanding such subsequent incumbrancer had been paid off, and had in his hands moneys of the mortgagor sufficient to pay off the first incumbrancer, but which moneys were not specially entrusted to him for that purpose. *Brown v. Woodhouse*, 14 Grant, 682.

IV. (2) *Priorities.*

A purchaser of real estate executed a mortgage to the vendor, securing a balance of purchase money on the understanding that the vendor was to remove an incumbrance existing at the time of sale. This mortgage was assigned, and the assignee thereof, though unaware of the terms upon which the same was executed, had notice of the outstanding incumbrance, and it was not pretended that he supposed that the purchaser had bought subject thereto. Upon a bill by the assignee for the foreclosure of the mortgage, *held*, that the most he was entitled to was, that having reduced the prior incumbrance to a sum not exceeding that secured by the mortgage held by him, the purchaser was bound to pay that

amount into Court, to be applied in clearing the title ; or, in default, his interest should be foreclosed, unless it was shewn that the existence of this mortgage prevented the purchaser from raising money upon the security of the land, in which case the plaintiff was bound to remove that incumbrance out of the way of the purchaser, who was declared entitled to three months after its being cleared off to procure the money ; but that this protection was properly obtainable by an application in chambers. *The Church Society v. McQueen*, 15 Grant, 281.

A mortgagee paying off a prior execution has a lien therefor against subsequent executions. *The Trust and Loan Company v. Culbert*, 14 Grant, 410.

B and wife, after executing a mortgage in favour of one *D*, conveyed the premises comprised therein to *J*, subject to the mortgage which was referred to in the conveyance, as also in the memorial thereof registered. After the registration of this conveyance, *J* and his wife executed a quit-claim deed of the premises to the wife of *B*. A mortgage was subsequently made in favour of *S*, which was signed and sealed by *B* and his wife but she was the only granting party named therein, and the same was executed before the mortgage to *D*: Held, that constructive notice of the mortgage to *D* was the most that could have been imputed to *S*, which was insufficient to postpone a prior registration, not that his mortgage was wholly inoperative in consequence of *B* not being named as a granting party therein. Where a party alleges the legal operation and effect of an instrument, he is bound by such allegation. *Foster v. Beall*, 15 Grant, 244.

There were two mortgages on the property in question : *O* bought the first mortgage, and subsequently the equity of redemption : Held, that the second mortgage did not thereby acquire priority over the first mortgage by the circumstance of the instrument executed by the first mortgagee having been in form a mere grant and release to *O* of the mortgagee's estate at law and in equity in the property ; nor by reason of the purchaser having given a mortgage on the property to secure a portion of the purchase money which he was to pay for the first

mortgage; nor by reason of his subsequently conveying portions of the property to his sons, and in terms subject to such mortgage. *Barker v. Eccles*, 17 Grant, 631.

An insolvent person executed to his son a mortgage for \$1,000, of which \$400 was a pretended debt to the son, and \$600 a pretended debt to his mother. The son subsequently, under an arrangement with the father, transferred the mortgage to C, who was the holder of notes of the mortgagor to the amount of \$600, which he gave up to the mortgagee, and he paid in cash \$400 to the mortgagee. C had notice of the character of the mortgage, but the transaction with him was *bona fide*: Held, that he was entitled to claim for the full amount of the security, in priority to subsequent execution creditors of the mortgagor [Mowat, V.-C., dissenting]. *Totten v. Douglas* (In Appeal), 18 Grant, 341.

V. MORTGAGE BY ABSOLUTE DEED.

1. *Sole by Sheriff of Equity of Redemption—Dormant equities—*

Statute of limitations—11th clause, Chancery Act.

2. *Costs.*

3. *Evidence.*

4. *Parties.*

5. *Parol evidence.*

6. *Subject generally.*

- V. (1) *Mortgage created by deed absolute in form—Sale by Sheriff of equity of redemption—Dormant equities—Statute of limitations—McCabe v. Thompson* (6 Grant, 175) followed. Application of 11th clause of Chancery Act. *Macdonald v. Macdonell*, 2 E. & A. R., 293.

V. (2) *Costs.*

A conveyance absolute in form, but intended as a security, was made by the owner of real estate. The sum secured was paid, but no reconveyance was executed. The owner, however, was always permitted to deal with the estate as his own, and created a mortgage thereon, with the knowledge of the person holding the legal title, who after the death of the mortgagor

commenced proceedings in ejectment, claiming under the absolute conveyance: on a bill filed for that purpose the Court restrained the action, and ordered the plaintiff therein to pay the costs of this Court. *Cayley v. McDonald*, 14 Grant, 540.

V. (3) *Evidence.*

Where a deed was absolute in form, and the alleged consideration was in part promissory notes theretofore held by the grantee against the grantor, the fact of these notes being left in the possession of the grantee is not alone sufficient to prove that the deed was intended as a mortgage. *Healey v. Daniels*, 14 Grant, 633.

V. (4) *Parties.*

Although the rule is that a prior mortgagee can be made a party only to redeem him, still if such prior security has been created by a deed, absolute in form, a subsequent mortgagee is at liberty to bring him before the Court for the purpose of shewing his interest to be redeemable without offering to redeem him. *Moore v. Hobson*, 14 Grant, 703.

V. (5) *Parol evidence.*

A deed was made by one joint owner of property at the instance of the other joint owner, to a third person, under a parol agreement that the grantee should hold the property to secure a sum of money which it was intended that he should advance to pay interest on a mortgage which was on the property, and that, subject thereto, the grantee should hold the property in trust for the wife of such other joint owner, who remained in possession of the property: *Held*, that parol evidence to establish the agreement was admissible. *Campbell v. Durkin*, 17 Grant, 80.

V. (6) *Subject generally.*

The distinction between a mortgage and an absolute sale, with a contemporaneous agreement for repurchase, explained; and an absolute conveyance held to be of the latter character rather

than the former, on the weight of evidence, which was conflicting. *Rapson v. Hersee*, 16 Grant, 685.

VI. SALES UNDER POWER OF SALE—UNDER DECREE FOR SALE
AND PURCHASERS UNDER.

1. *Sales where heirs of Mortgagor unknown.*
2. *Purchase for Mortgagee under power of sale.*
3. *Powers of sale.*
4. *Improvements by purchaser under void sale—Arrears of Interest.*

VI. (1) *Sale where heirs of Mortgagor unknown.*

Where a party interested in the equity of redemption is dead, and his heirs are out of the jurisdiction and unknown, the Court has jurisdiction in a suit by the first mortgagee against a subsequent mortgagee and the Attorney-General, to direct a sale of the property, and the proceeding cannot afterwards be set aside by the heirs except for error or fraud. In such a case the conditions of sale must state these circumstances. *Smith v. Good*, 14 Grant, 444.

VI. (2) *Purchase for Mortgagee under power of sale.*

Where a sale took place under a power of sale in a mortgage, and the clerk of the mortgagee's attorney became the purchaser but paid nothing, notwithstanding which the mortgagee conveyed the property to him, and he immediately reconveyed to the mortgagee: *Held*, that the sale was invalid, and the property still redeemable, although the mortgagor immediately after the sale accepted a lease of the property. *Ellis v. Dellabough*, 15 Grant, 583.

VI. (3) *Power of sale.*

Where a sale takes place under a power contained in a mortgage, and the sale is not properly conducted through the fault of the solicitor, the mortgagor, or any other party interested as well as the mortgagee, has a right to institute proceedings complaining thereof. *Howard v. Harding*, 18 Grant, 181.

First mortgagees with a power of sale released portions of the mortgaged property to the mortgagor: *Held*, that this did not give priority to a subsequent incumbrancer with respect to the remainder of the property; but might render the first mortgagees responsible to the second for the fair value of the parcels released. *The Trust and Loan Company of Canada v. Boulton*, 18 Grant, 234.

VI. (4) *Improvements by purchasers under void sale—Arrears of Interest.*

Improvements made by a defendant under the belief that he was absolute owner, are allowed more liberally than to a mortgagee who improves knowing that he is but a mortgagee.

A person purchased under a power of sale in a mortgage, but the sale was irregular, and was set aside: *Held*, that, as a condition of relief against him, he should be allowed for all the improvements he had made, under the belief that he was absolute owner, so far as these improvements enhanced the value of the property, but no further; and that he was not restricted to such improvements as a mortgagee in possession would have been entitled to make, knowing that he was a mortgagee. *Carroll v. Robertson*, 15 Grant, 173.

VII. MISCELLANEOUS CASES:

[Affecting the subject generally, and relating incidentally to the matters indicated by the headings.]

1. *Fire Insurance.*
2. *Mortgage payable without interest.*
3. *Equitable interest in leasehold lands—Merger—Rectory lands.*
4. *Fraud on creditors—Assignee for value without notice.*
5. *Rights, duties and liabilities of purchasers.*
6. *Mandatory injunction.*
7. *Mortgage contemporaneous with deed not signed by wife.*
8. *Equitable Mortgage.*
9. *Registration.*

10. *Parol trust.*
11. *Antecedent debt.*
12. *Dower.*
13. *Assignee of Mortgage.*
14. *Lien.*
15. *Estoppel—Representation affecting third parties.*

VII. (1) *Fire Insurance.*

A fire policy in the name of a mortgagor contained this clause: "In the event of loss under this policy the amount the insured may be entitled to receive shall be paid to A. Livingstone, mortgagee." There was evidence that the insurance was applied for by the mortgagee and was intended for his security: *Held*, that to the extent of the mortgagee's interest a subsequent act of the mortgagor, to which the mortgagee was no party, would not avoid the policy. *Livingstone v. The Western Assurance Company*, 14 Grant, 461.

VII. (2) *Mortgage payable without interest.*

A mortgage dated 23rd May, 1846, secured the payment of £112 10s., without interest, on or before the 23rd May, 1847, containing a power of sale on default of payment, and provided that the mortgagee after deducting the costs and expenses of sale, "and the said sum of £112 10s. without interest," should pay the surplus to the mortgagor: *Held*, that interest was payable from default; but from the correspondence between the parties the Court treated the interest as paid up to May, 1859. *McDonell v. West*, 14 Grant, 492.

VII. (3) *Equity of redemption in leasehold—Merger—Rectory lands.*

Where two mortgages had been created on a leasehold interest in rectory lands, the equity of redemption in which was afterwards sold at sheriff's sale under common law process and the purchaser paid off the prior mortgage: *Held*, that the purchaser being bound to protect the mortgagor against both the incumbrances was not at liberty to keep alive the prior mortgage as against the second mortgage.

In such a case the purchaser upon the expiration of the term obtained a new lease from the rector and created a mortgage on such new term: *Held*, that such new lease was a mere graft upon the original one, and, as such, was subject to the mortgage which had been left outstanding, but as notice of that fact could not under the circumstances be imputed to the mortgagee of the new term, he was declared entitled to priority.

Whether an equity of redemption in a leasehold interest is saleable under common law process—*Quære?* *McDonell v. Reynolds*, 14 Grant, 691.

VII. (4) *Fraud on creditors—Assignee for value without notice.*

An insolvent person executed to his son a mortgage for \$1,000, of which \$600 was a sum fraudulently pretended to be due to the mortgagor's wife: *Held*, that, even if the remaining sum was really due to the mortgagee, his concurrence in the fraud as to the \$600 rendered the mortgage void *in toto*.

The assignee of a mortgage is entitled to set up the defence of a purchase for value without notice.

A party intending to purchase a mortgage should communicate with the mortgagor before purchasing; and if he refrains from doing so, his assignment is subject to all equities there were between the mortgagor and mortgagee, though the assignee may not have had actual notice of them.

The assignee of a mortgage, impeached as having been made without consideration and to defraud creditors, in setting up the defence of a purchase for value without notice, must deny notice that the mortgage was given without consideration; and a mere denial of notice of the claim of the impeaching creditor is insufficient. *Totten v. Douglas*, 15 Grant, 126; and 16 Grant, 243.

VII. (5) *Rights, duties and liabilities of purchasers.*

Where the purchaser of mortgaged premises had perfected his title thereto by means of a conveyance from the mortgagee, who had obtained a final order of foreclosure, and it was sought by the mortgagor to impeach the title of such purchaser by reason

of irregularities in the foreclosure proceedings, of which, however, it was not shewn that the purchaser was aware; but the decree and the final order on the face of them was regular: *Held*, that the purchaser was not bound to inquire into the regularity of the proceedings upon which the decree and final order were founded, and dismissed the bill with costs. *Gunn v. Doble*, 15 Grant, 655.

VII. (6) *Mandatory injunction*¹

The plaintiff, a mortgagee, filed his bill for foreclosure and for an injunction to restrain the vendee of the mortgagor from removing a building erected on the property. The Court thought that the building having been actually removed, it was a proper case for a mandatory injunction; but it appearing that the building had been removed piecemeal, and that there might be difficulty in restoring it, an inquiry was directed to ascertain the value thereof, as sufficient for the justice of the case. *Meyers v. Smith*, 15 Grant, 616.

VII. (7) *Mortgage contemporaneous with deed not signed by wife.*

J being the owner of certain lands, conveyed the same in fee to *L*. The latter afterwards conveyed them to *J*'s wife. She and her husband then executed a mortgage of the lands to *G*; but the wife was never separately examined. *L* then filed his bill alleging that the mortgage was to be taken to secure part of the purchase money, and that *J*'s wife refused to be examined. By the decree it was referred to the Master at Guelph to ascertain the consideration for the original deeds. The Master reported, that the original were given by *J* to *L* without consideration, to enable *J* to defeat his creditors. From this report the plaintiff appealed; but the appeal was dismissed. The defendants then heard the cause on further directions; but the plaintiff did not appear: *Held*, that the plaintiff was entitled to have the mortgage completed, or the deeds to *J*'s wife given up to be cancelled. But as the plaintiff did not appear he did not get a decree, though the defendants were refused any relief. *Lindsay v. Johnston*, 15 Grant, 446.

VII. (8) *Equitable Mortgage.*

The customer of a bank created a mortgage in favour of the institution by deposit of title deeds. In a suit to realize the security, the debtor swore that the deposit had been made to secure certain future advances, all of which had been paid off. The officers of the bank, on the other hand, swore that the security was required by the bank, and given by the debtor to secure all his indebtedness, past as well as future, and a memorandum enclosed at the time of the deposit on the envelope containing the deeds was to the same effect. The Court, in the view that the deposit, if made as alleged by the bank, was lawful, while, if made for the purpose stated by the debtor would have been illegal, made a decree in favour of the bank, with costs. *The Royal Canadian Bank v. Cummer & Mason*, 15 Grant, 627.

VII. (9) *Registration.*

A mortgage at the date of its execution, the same having been registered, was ineffectual to pass the wife's estate, by reason of her not having been examined apart from her husband; and subsequently such mortgage was re-executed by the husband and wife, and the fact of the wife having been duly examined indorsed thereon, so that the deed was made effectual to pass her estate, but no registration took place: *Held*, that the registration was sufficient under the statute; but that the examination of the wife upon the re-execution of the mortgage could not relate back to the first execution thereof, so as thereby to gain for it priority of an instrument which had been subsequently executed by the husband and wife, and duly registered. *Beattie v. Mutton*, 14 Grant, 686.

The owner of lots *A* and *B* sold *A*, but the conveyance was not registered; he afterwards mortgaged *A* and *B*, and the mortgagee registered the mortgage without notice of the prior deed; the mortgagor subsequently sold *B* in portions by three successive sales: *Held*, in a suit by the assignees of the mortgage for a sale, that the decree should be for the sale first of *B*; and that if a sale of part of *B* produced enough, the portion

last parted with by the mortgagor should be first sold. *Barker v. Eccles*, 17 Grant, 277.

VII. (10) *Parol Trust*.

A, who was greatly addicted to drinking, gave to *B* a mortgage to secure a small debt; the property was worth at least seven times the debt; and the rent of half the property, for three years, would have paid off the claim; but five years before the debt was payable, *A*, without any additional consideration, released his equity of redemption to *B*; and *B* was allowed to remain in possession for seven or eight years after the mortgage debt was paid off by rents. A majority of the Judges of the Court of Appeal were of opinion, and held, [affirming the decree of the Court below,] that the facts and evidence shewed that the release was given on a parol trust, for the benefit of the mortgagor and his family, and that to set up the release as an absolute purchase was a fraud on the part of *B* against which the Court should relieve, notwithstanding the lapse of time and the death of some of the witnesses. *Crippen v. Ogilvie*, 18 Grant, 253.

VII. (11) *Antecedent Debt*.

A mortgage was obtained by pressure from an insolvent person (a miller) three months before he executed an assignment in insolvency; the mortgage was for an antecedent debt, and was not enforceable for two years; it comprised the mortgagor's mill only, and left untouched about one-third of his assets; it was not executed with intent to give the mortgagees a preference; and at the time of obtaining it they were not aware of the mortgagor's insolvency. In a suit by the assignee in insolvency, impeaching the transaction, the mortgage was held to be valid.

The mortgagees, shortly after obtaining this mortgage, became aware of their debtor's desperate circumstances, and obtained from him, by pressure, a mortgage on his chattels used in his business: this mortgage was held void against the assignee in insolvency. *McWhirter v. The Royal Canadian Bank*, 17 Grant, 480.

VII. (12) *Dower.*

A wife joined in a mortgage of her husband's estate to secure a loan of one-fourth or one-fifth of the value of the property, and he subsequently sold the property; his wife claimed to be entitled to dower, and refused to join in the conveyance without a reasonable compensation being made to her; her right to dower being supposed by all parties to exist, her husband had a piece of land conveyed to her, which she accepted, and thereupon she signed the conveyance of the mortgaged estate. The transaction appearing to have been for the interest of creditors, it was held to be valid, independently of the question whether her claim to dower was in such a case well founded in point of law or not. *Forrest v. Laycock*, 18 Grant, 611.

VII. (13) *Assignee of Mortgage.*

An assignee of a mortgage cannot set up the plea of purchase without notice against a prior equity. *Smart v. McEwan*, 18 Grant, 623.

VII. (14) *Lien.*

The registered owner of land mortgaged the same, and afterwards conveyed the property absolutely to a purchaser, who registered before such mortgage, giving back a mortgage to secure purchase money; and subsequently the vendor assigned his mortgage to a purchaser who had no notice of the prior mortgage: *Held*, that the purchaser's mortgage in the hands of the assignee was subject to the lien or charge of the vendor's mortgage. *Ib*

A registered owner of Whiteacre and Blackacre and other lands mortgaged all to the plaintiff: the holder then sold Whiteacre to *B*, and afterwards Blackacre to *K*, covenanting in each case against all incumbrances. The various instruments were respectively registered immediately after their execution: *Held*, that *B*'s right, as between him and *K*, was to throw the whole mortgage, and not merely a ratable part, on Blackacre. *Jones v. Beck*, 18 Grant, 671.

VII. (15) *Estoppel—Representation affecting Third Parties.*

The owner of real estate created a mortgage thereon, and afterwards sold and conveyed a portion of the property by a deed containing covenants for quiet enjoyment, freedom from incumbrances, &c., taking from the purchaser a bond, conditioned for the payment of a proportionate amount of the mortgage debt: *Held*, reversing the judgment of the Court below, that the fact of the purchaser holding such absolute conveyance was not such a representation to the holders of the mortgage as warranted them in executing to the purchasers a release of his portion of the estate from the mortgagee, and afterwards looking to the mortgagor for payment thereof. [VAN KOUGHNET, C., dissenting.] *Bank of Montreal v. Hopkins*, 2 E. & A. R., 458.

MORTMAIN.

See WILL, IV.

Where a sum of money was bequeathed for the erection of a parsonage: *Held* (first), that there was an implied authority to purchase land whereon to erect such parsonage; (second), that in the absence of anything to shew that no portion of the fund was to be applied in the purchase of the land, the bequest was void under the Statute of Mortmain. *Davidson v. Boomer*, 2 Cham. R., 1.

Corporation to hold lands without license.

By the Act of Incorporation 7 Vic. ch. 68, the Church Society of Toronto is enabled to hold real estate without any license for that purpose. *The Church Society of the Diocese of Toronto v. Crandell*, 8 Grant, 341.

MOTIONS.

See NOTICE — PRODUCTION OF DOCUMENTS — INJUNCTION — COSTS.

1. *Motion to commit.*

Service of notice of motion to commit on the solicitor of

the party charged with contempt, is good service. *Gourlay v. Riddell*, 2 Cham. R. 158.

A motion to commit must be made on four days' notice. Where, therefore, an application for an order to put in a better affidavit on production or be committed was made on two days' notice, the Secretary refused the motion. *Broughall v. Hector*, 2 Cham. R., 434.

2. *Made by leave of Judge.*

It is no objection to a motion made by leave of a Judge, that the name of the Judge granting leave is not given in the notice of motion. *Lindsay Petroleum Co. v. Hurd*, 2 Cham. R., 387.

3. *For order to execute deed.*

An application for an order to compel a party to execute a deed directed to be executed, should be on notice, and will not be granted *ex parte*. *Westmacott v. Cockerline*, 2 Cham. R., 442.

MULTIFARIOUSNESS.

See DEMURRER—PLEADING—ANSWER—ADMINISTRATOR, &c., V.

MUNICIPAL LAW.

See PRINCIPAL AND SURETY.

Municipal Treasurer and his Sureties. See ACCOUNT.

I. DECISIONS ON THE SUBJECT GENERALLY IN, AND APPLYING TO, THE FOLLOWING CASES :—

1. *Applying money raised for special purpose.*
2. *Agreement between two municipalities made under misapprehension.*
3. *Duty of Reeve.*
4. *Power of Council to appoint person to sign debentures.*
5. *Restraining sale of debentures.*
6. *Compensation to Mortgagee for land taken for highway.*

7. *Injunction against Municipal Council.*8. *Municipal Officers.*9. *Rates.*1. *Applying money raised for special purpose.*

Where a by-law was passed by a township council for raising a loan for a special purpose, it was *held* to be contrary to the duty of the township treasurer to apply the money to any other corporate purpose.

But where, in such a case, the application had been actually made before the filing of a bill by a ratepayer complaining of the application, and such application had been made in good faith, in discharge of a legal liability of the township, and the township council approved of and adopted the payment, a bill by a ratepayer to compel the treasurer to repay the amount and personally bear the loss, was dismissed. *Grier v. Plunkett*, 15 Grant, 152.

2. *Agreement between two municipalities made under misapprehension.*

On the separation of three townships into two municipalities, the two corporations executed an instrument whereby the one agreed to pay to the other a certain sum as soon as certain non-resident rates theretofore imposed should become available. It was subsequently discovered that these rates had been illegally imposed, and that the supposed fund would never be available its supposed existence had been an element in determining the amount to be paid: *Held*, that the corporation to which the money was to be paid, was not entitled to have the agreement altered, so as to make the money payable to the other absolutely. *Arran v. Amabel*, 17 Grant, 163.

3. *Duty of Reeve.*

At a meeting of a township council the Reeve who was in the chair refused to put a motion which had been duly made and seconded, whereupon the members voted on the motion without its being put by the chairman, and a majority were in favour of the motion: *Held*, that the Reeve had no right to refuse to put

the motion, and that the vote was proper and effectual. *The Municipality of the Township of Brock v. The Toronto and Nipissing Railway Company*, 17 Grant, 425.

4. *Power of Council to appoint a person to sign debentures.*

A municipal by-law for issuing debentures which had been submitted to the ratepayers and approved by them, contained a clause stating that the debentures were to be signed by the Reeve: *Held*, that the council had power to appoint another person to sign the debentures in place of the Reeve. *Ib.*

5. *Restraining sale of Debentures.*

A municipal corporation having passed a by-law giving a certain sum in debentures by way of bonus to a Railway Company, the Company executed a bond to the township reciting that the township had agreed to give the bonus on condition (amongst other things) that sixty continuous miles of the road should be built within two years; that the debentures should not be disposed of by the Company until the contracts had been let and the work commenced; and that if the road were not commenced and built as mentioned, the debentures should be returned to the municipality; and the condition of the bond was, that in case of failure the Company would, on demand, pay over to the township the sum of \$50,000, or return the debentures. The contracts having been let and the work commenced as stipulated: *Held*, in view of the whole instrument that the Company should not be restrained from disposing of the debentures before the completion of the work. *Ib.*

6. *Compensation to Mortgagee for land taken for highway.*

Land which had been mortgaged by the owner, was taken by a township council for a road, and the compensation having been ascertained by award, the corporation paid the amount to a creditor of the mortgagor, by whom it had been attached: *Held*, that the mortgagee had the prior right; that his mortgage being a registered mortgage, the corporation must be taken to have acquired the land with notice of it; and that the mortgagee was entitled to recover the amount from the corporation with costs. *Dunlop v. The County of York*, 16 Grant, 216.

7. *Injunction against Municipal Council.*

Where for the purpose of erecting a market house, a municipal council would require to levy a rate which would exceed the amount of two cents in the dollar allowed to be imposed by section 225 of the Municipal Act, it was *held* that a ratepayer was entitled to an injunction restraining the erection of the building by the council. *Wilkie v. The Corporation of Clinton*, 18 Grant, 557.

8. *Municipal Officers.*

It is culpable neglect of duty on the part of municipal officers not to see that separate accounts for special rate, sinking fund, and assessment for general purposes are kept as directed by the statute. *Wilkie v. The Corporation of Clinton*, 18 Grant, 557.

9. *Rates.*

The limit of two cents in the dollar, by the Municipal Act of 1866, as the maximum of assessment, includes the special sinking fund rate to be levied in respect of past debts. *Ib.*

MUTUAL RIGHTS.

See CANAL.

NAVIGATION, IMPEDING.

See INJUNCTION, II. 7.

NEGLIGENCE.

See SOLICITOR.

NEW HEARING.

See HEARING.

NEW TRIAL.

See EVIDENCE, I. 9.

NEXT FRIEND.

See SECURITY FOR COSTS, 1—APPEALING, V. (2)—ADMINISTRATION.

1. When a bill is filed by a next friend, if he is not a person

of substance, the plaintiff will be required to give security for costs.

The proper order in such case seems to be to stay proceedings until the next friend is changed or security given. *Leishman v. Eastwood*, 2 Cham. R., 88.

2. A motion to change a next friend must be on notice. *Eastman v. Eastman*, 2 Cham. R., 183.

3. The next friend of an idiot stands in the same position as the next friend of an infant, and is not required to establish his solvency or give security for costs. Where, however, in the bill, the description and residence of the next friend was not given, the Secretary ordered amendment to be made within a week, giving the residence and description, or the defendant to be entitled to security for costs. *Sharp, v. Sharp*, 2 Cham. R., 244.

4. *Semble*. If the next friend of a married woman makes the necessary affidavit of justification, swearing that he is worth £100 over his debts, and this is not contradicted, the question of his solvency will not be gone into. *McBean v. Lilley*, 2 Cham. R., 247.

5. In the case of an infant plaintiff the Court will not require security for costs, or remove a next friend because he is not a person of substance.

A motion to remove a next friend on the ground that during the progress of the suit he had become insolvent was refused with costs. *Re McConnell*, 3 Cham. R., 423.

6. On an appeal against the report of the Master by a married woman and her husband, defendants in the suit, it is not necessary that the married woman should have a next friend; such case differing from an application by a married woman alone. *Hancock v. McIlroy*, 18 Grant, 209.

7. Where a married woman defended a suit in Chancery without a next friend, it was held that the husband and wife could appeal to the Court of Error and Appeal without any next friend. *Butler v. Church*, 18 Grant, 190.

8. Where a married woman is a co-plaintiff with her husband who has a substantial interest in the suit it is nevertheless necessary that the wife should sue by next friend. *Blackburn v. McKinlay*, 3 Cham. R., 65.

7. The test of the solvency of a next friend is, whether he is worth £100 over and above what will pay his just debts. If the allegation to such effect is uncontradicted, or the fact established by evidence, it is sufficient.

When on a motion to change a next friend on the grounds of insolvency, the next friend's own cross-examination shewed him worth the necessary amount, and no evidence to the contrary was adduced, the motion was refused with costs. *Stovel v. Coles*, 3 Cham. R., 421.

NOTICE.

See QUIETING TITLES, 9-17—NEXT FRIEND, 2—SECURITY FOR COSTS, 1—MOTION, 3.

Allegation in Bill as to. See PLEADING.

1. *Notice of motion to commit.*
2. *Of reading affidavit referring to document.*
3. *Notice of assignment for benefit of creditors.* See also TITLE, 5.
4. *Of hearing.*

1. *Notice of motion to commit.*

The notice of motion to take an affidavit on production off the files, and to commit for contempt should be served on the defendant's solicitor and not on the defendant personally.

Motions for order to commit for non-production are properly made in Chambers. *Ross v. Robertson*, 2 Cham. R., 66.

On a motion to commit for non-production of certain documents after an insufficient affidavit on production, it is not absolutely necessary that the notice of motion should specify what is demanded in addition to what has been produced though the Court considered such the better course. On such a notice the

Court will grant the lesser relief, and order further production, but without costs. *Fisken v. Smith*, 2 Cham. R., 491.

Four days' notice must be given of a motion to commit. *Gray v. Hatch*, 2 Cham. R., 12; *Broughall v. Hector*, 2 Cham. R., 434.

2. *Notice of reading affidavit referring to document.*

Where an affidavit refers to a document and notice of reading such affidavit is given, the document (in this case the endorsement on the office-copy of a bill) may be read without special reference to it in the notice. *Johnson v. Ashbridge*, 2 Cham. R., 251.

3. *Notice of assignment for benefit of creditors.*

The mere fact that certain creditors had notice of an assignment, without some act on their part equivalent to an accession to the trusts in the deed, or such as would prejudice their rights, does not make the deed irrevocable. *Spooner v. Jones*, 3 Cham. R., 481.

4. *Notice of hearing.*

Where a notice of hearing had been given, and by a mistake of the month, it was for a day past, the Court allowed it to stand, putting the parties on terms as to costs, and changing the venue for the convenience of going to hearing.

Where such notice had been moved against before the Referee, and the affidavits failed to negative the receipt of any other notice, and the motion consequently was refused, but leave was given to renew it: *Held*, that the giving time to renew the motion was an unwise exercise of discretion, and that it was open to the Judge on appeal to ignore or reverse it. *Scott v. Burnham*, 3 Cham. R., 339.

NUISANCE.

1. *Street Railway.*

Where on an information by the Attorney General, the rails of a street railway were found by the Court not to conform to

the requirements of the Statute authorising the railway, the Court granted a decree for the removal of the illegal rails ; but directed that the decree should not go into effect for a specified period so as to afford time to the Company, by proper alterations and repairs, to comply with the Statute. *Attorney-General v. Street Railway Company*, 15 Grant, 187.

2. Acquiescence.

In 1861, while the defendant was engaged in erecting buildings for a tannery on land adjoining the plaintiff's premises, the plaintiff encouraged the defendant to proceed with his project ; the buildings were proceeded with, and business in them was commenced the same year ; in 1863 additions were made to the buildings with the plaintiff's knowledge and acquiescence ; and the plaintiff made no complaint about the business until 1868, though all this time it had been carried on, and the plaintiff had been residing on the premises adjoining : *Held*, [affirming the decree of the Court below,] that by his conduct he had debarred himself from obtaining relief in equity on the grounds of a tannery being a nuisance. *Heenan v. Dewar*, 18 Grant, 438.

OFFICE COPIES.

Affidavits.

If office-copies of affidavits are demanded, it is imperative on the party filing the affidavits to furnish them ; and the costs of any delay occasioned by his not doing so falls on the party making such default. *Burrowes v. Hainey*, 2 Cham. R., 186.

Bill.

The indorsement of an office-copy bill must specify distinctly which relief the plaintiff seeks, whether sale or foreclosure. *Drewry v. O'Neill*, 2 Cham. R., 204.

Pleadings.

The order to furnish office-copy pleadings when demanded is imperative, and the Court will enforce compliance with it. *Totten v. McIntyre*, 2 Cham. R., 80.

OLD DEEDS.

See QUIETING TITLES ACT, 5.

ONUS OF PROOF.

See HUSBAND AND WIFE, 1. MORTGAGE, 1, 6.

Of alteration in deed. See DEED, VI.

OPENING BIDDINGS.

1. An order to open biddings will not be made after great delay against an innocent purchaser, unless misconduct is shewn on the part of the purchaser. *Crooks v. Crooks*, 2 Cham. R., 29.

2. Where the title or proof of it is involved in no difficulty, a condition of sale that "the vendor is not to be bound to give any evidence of title, or any title deed, or copies thereof, other than such as are in his possession, or procure any abstract," was held to be very objectionable, and should not be sanctioned by Masters even by consent. *McDonald v. Gordon*, 2 Chanc. R., 125.

3. Biddings will not be opened and a sale set aside on the ground that a party (the defendant) was prevented from bidding by promises made to him by the purchaser; such fact, if established, would constitute the purchaser a trustee for him, and would be subject for a suit. *Brock v. Saul*, 2 Cham R., 145.

ORDERS.

I. ORDER TO PRODUCE.

II. GENERAL ORDERS OF COURT.

III. IRREGULAR ORDERS, SETTING ASIDE.

IV. ORDER TO REVIVE.

I. ORDER TO PRODUCE.

See PRODUCTION OF DOCUMENTS—SUBPENA.

II. GENERAL ORDERS OF COURT.

Construction of the undermentioned Orders.

Orders 390, 391, 392, 393. See TITLE.

" 163. See TIME.

1. Order 560.—A motion for leave to appeal from a Master's report after the time limited has expired, need not be made before a Judge. *Russel v. Brucken*, 3 Cham. R., 488.

2. A direction to do an act "forthwith" is a sufficient compliance with Orders 288 and 293. *Wallace v. Acres*, 2 Cham. R., 392.

3. Orders 40 and 41. *Coates v. Edmundson*, 2 Cham. R., 439.

4. Order 79. *Tyron v. Pears*, 2 Cham. R., 470.

5. Order 79 applies only to copies order to amend, not to office copies of bill. *Tyron v. Pears*, 2 Cham. R., 470.

Order 266—*Depositions irregularly taken.*

6. Where a subpoena had been sued out under Order 266, and an appointment thereunder given by a special examiner at a time when no motion or other proceeding was pending: It was *held* to be irregular, and that the depositions taken could not be read.

The attending under such a subpoena was *held* not to be a waiver of the irregularity, the objection being to the jurisdiction, which no waiver could confer. *Stovel v. Coles*, 3 Cham. R. 362.

III. IRREGULAR ORDERS, SETTING ASIDE.

If an order is complained of as irregular, it is not competent to the opposite party to move to amend or alter it; his course is to move to set it aside, and this must be done within the

time limited by the orders regulating the practice. *Brigham v. Smith*, 2 Cham. R., 257.

IV. ORDER TO REVIVE.

1. Where an order to revive is obtained to add a party who is an assignee of the defendant, it is not necessary to describe him in the order as assignee. *Ib.*

2. Order of revivor improperly obtained on præcipe, set aside on terms, notwithstanding delay in making the application.

The defendant, though aware that *A* had no interest in the matters in question, made him a party by order of revivor obtained on præcipe. *A* was then, and for some time afterwards, under the belief that he had been made a party properly, and, even after he had found out that he had been made a party improperly, he did not apply to have the order of revivor set aside as against him, till he found that he was prejudiced by it, he then petitioned to have the order set aside as against him, and the Court granted the application on the terms of his paying the costs of the petition and any costs that had been incurred by his having been made a party. *Smith v. Gunn*, 2 Cham. R., 230.

3. When a suit became defective, and is proceeded with without an order to revive being taken out, a subsequent application, by petition, to supply the defect by adding parties is not improper; but the new parties may not be bound by the proceedings in their absence. *Peck v. Bucke*, 2 Cham. R., 294.

PAROL.

Gift by. See GIFT BY PAROL.

PAROL AGREEMENT.

See DEED, V.

A parol agreement in reference to land partly performed, by execution of deeds, was enforced. *Shennan v. Parsill*, 18 Grant, 8.

C contemplated the erection of a saw-mill on land which he owned, but he required the privilege of backing water on the lands of four other persons having lands farther up the stream ; from three of these persons he obtained, through the agency of the fourth of them (*E*) the right, by deed, of backing the water to whatever extent would be occasioned by a dam nine feet high. The fourth (*E*) verbally gave the same right, but executed no writing. *C* thereupon erected a dam seven feet six inches high; but finding this insufficient, he, some years afterwards, desired to raise it further. *Held*, by the Court, on appeal [*SPRAGGE, C., and MOWAT, V.-C., dissenting*], that *E.*'s agreement was not binding to any greater extent than *C.* had taken advantage of in erecting his original dam. *Hendry v. English*, 18 Grant, 119.

A parol agreement to add two per cent. to the rate of interest reserved by a mortgage, in consideration of an extension of the time for payment, was *held* insufficient to charge the extra interest upon the land. *Totten v. Watson*, 17 Grant, 233.

An alleged parol agreement, said to have been entered into contemporaneously with a covenant under seal, was not permitted to control the covenant, the parol agreement having been proved by one witness only, whose intention to speak the truth was admitted on all hands, but the accuracy of whose recollection was not confirmed by other evidence. *Lewis v. Robson*, 18 Grant, 395.

PAROL EVIDENCE.

See ABSOLUTE DEED—MORTGAGE, I. 15; V. 5—EVIDENCE—AGENT, III.—SPECIAL PERFORMANCE.

In a suit to enforce a trust, the 7th section of the Statute of Frauds not being set up by the answer, it was *held* that the trust might be shewn by parol, and might be shewn to be different from the trust stated in the answer. *Shaw v. Shaw*, 17 Grant, 282.

PAROL TRUST.

See MORTGAGE, 7-10—TRUSTS, &c., 7.

To establish a Trust.

PART OWNER.

See INJUNCTION.

PARTIES.

See ADMINISTRATION, III.—DOWER—EXAMINATION, I.—INJUNCTION—PLEADING—TAX SALE—WILL—RAILWAY—PARTNERSHIP, I. 7—JUDGMENT, 6—MORTGAGE, V.

I. PARTIES TO BILLS AND INFORMATIONS.

II. PARTIES TO PETITIONS.

I. PARTIES TO BILLS AND INFORMATIONS.

1. A plaintiff filed a bill to enforce a legal right only, and, in the course of the proceeding, it appeared that there were others in regard to whom it was a question, proper to be discussed, whether they had not an equitable right in the subject of the suit; one of whom had not been made a party, and the other had failed in a legal defence which he had set up, but the point was not raised by the parties; the Court, under the circumstances, ordered the cause to stand over without costs, in order to add parties; the party so failing in his legal defence to be at liberty to put in a supplemental answer, if so advised. *Wilson v. Proudfoot*, 14 Grant, 630.

2. Where a bill seeks the destruction of trust estate, some or one of the *cestuis que trust* are necessary parties.

In order to the proper constitution of the suit, the husband of a female married plaintiff must be made a defendant thereto. *Baker v. Trainor*, 15 Grant, 252.

3. To a suit by a second incumbrancer, to redeem the prior incumbrancer, the owners of the equity of redemption are necessary parties. *Long v. Long*, 16 Grant, 239.

4. The plaintiff was execution creditor of one S, who became

a mortgagee of the premises in question. To a suit instituted by a prior mortgagee the plaintiff was not made a party. *Held*, that the plaintiff's position as execution creditor of *S* was that of a derivative mortgagee *in invitum*, and, as such, he ought to have been made a party to the suit by the prior incumbrancer. *Darling v. Wilson*, 16 Grant, 255.

5. A vendor devised his estate to trustees, and, on a division of the estate among the *cestuis que trust*, the trustees conveyed to one of them the sold property; these facts appeared on a bill by the purchaser against the grantee for specific performance; the defendants set up by answer that the executors and trustees were necessary parties; the Chancellor, at the hearing, overruled the objection, and the Court of Appeal sustained the decree. [DRAPER, C.J., and GWYNNE and GALT, JJ., dissenting.] *Butler v. Church*, 18 Grant, 190.

6. Where a member of a partnership whose accounts the Master was directed to take, was by order made a party in the Master's office, but on subsequent inquiry it appeared that all liability on his part was barred by the Statute of Limitations, the Master, on the application of the party added, discharged his former order, holding that he was not a necessary or proper party, and that all partnership accounts required to be taken could be taken in his absence. *Kline v. Kline*, 3 Cham. R., 161.

7. Defendants presented their petition for a second re-hearing, on the ground that certain persons, necessary parties, were not before the Court; but as two opportunities of making the objection had been disregarded, and the interests of the parties complaining of the omission would be properly protected by making them parties in the Master's office, the petition was refused.

The proper practice is to bring all necessary parties before the Court at the hearing, and not to add them in the Master's office. *Paterson v. Holland*, 8 Grant, 238.

II. PARTIES TO A PETITION.

A petition should set out the addition and description of the petitioners in the same manner and with the same certainty as a Bill of Complaint. *Hunter v. Mountjoy*, 2 Cham. R., 90.

PARTITION.

See INFANT.

1. *Mortgage of Undivided Share.*
2. *Setting aside.*
3. *Infant Executor.—Liability to Account.*
4. *Hotchpot.*
5. *Advancement.*
6. *Agreement as to.*

1. *Mortgage of Undivided Share.*

Although partition may be directed of an estate subject to a mortgage thereon, still, if one of several co-tenants creates an incumbrance on his undivided share, and institutes proceedings to obtain a partition of the estate, the party holding the incumbrance must be brought before the Court, so as to bind the legal estate : and the party creating the charge must bear any additional expense occasioned thereby. *McDougall v. McDougall*, 14 Grant, 267.

2. *Setting aside.*

An unequal partition obtained in a County Court against a minor, and *feme covert*, through the contrivance of the co-tenant, the gross laches of the guardian *ad litem*, and the misapprehension of the Referee (appointed under the 17th section of the Partition Act) as to the extent of his duty and power, was held not binding. The minor, on coming of age, filed a bill for a new partition, and a decree was made accordingly. *Merritt v. Shaw*, 15 Grant, 321.

3. *Infant Executor.—Liability to Account.*

In a suit for the partition of the real estate of an intestate, who was one of the executors of his father's will, and had taken possession of the personal estate, and who died a minor,

it was claimed on behalf of infant legatees, who had not been paid their legacies, that an account should be taken of the personal estate come to the hands of such executor, and that their shares thereof might be charged upon the land in question before partition. *Held*, that the executor having been a minor, his estate was not liable to account therefor. *Nash v. McKay*, 15 Grant, 247.

4. *Hotchpot*.

A child who has been advanced, is bound to bring into hotchpot that wherewith he has been advanced, only when it has been so expressed in writing, either by the parent or the child so advanced. *Filman v. Filman*, 15 Grant, 643.

5. *Advancement*.

A father placed one of his sons in possession of certain wild land, and announced his intention of giving it to him by way of advancement. He died without carrying out this intention; meanwhile the son had taken possession, and by his improvements nearly doubled the value of the land: *Held*, that the son was entitled to a charge for his improvements, and to have the land allotted to him in the division of his father's estate, provided the present value of the land in its unimproved state would not exceed his share of the estate. *Biehn v. Biehn*, 18 Grant, 495.

In such a case whether the son is not entitled to an absolute decree for the land. *Quære. Ib.*

See the same point. *Hovey v. Ferguson*, 18 Grant, 498.

6. *Agreement as to*.

The adult co-heirs of an estate agreed to a partition, and bound themselves to execute quit claims to carry it out as soon as the minors came of age and united therein: some of the co-heirs went into possession of their portions and made improvements: some leased their interest in the property allotted to others; but some of the minors on coming of age declined to adopt the agreement: *Held*, on that account, that the agreement

was not binding on any of the parties to it ; and a decree for partition was made ; and the Master was directed to have regard in partitioning to the possession and improvements by the parties. *Wood v. Wood*, 16 Grant, 471.

PARTNERSHIP.

I. RIGHTS OF PARTNERS AS AGAINST EACH OTHER, AND SUITS BETWEEN.

1. *Dissolution brought about by bad faith.*
2. *Statute of limitations.*
3. *Division of losses.*
4. *Agreement acted on not signed by one partner.*
5. *Statute of Frauds.*
6. *Costs in suits between.*
7. *Partners retiring to be indemnified by the continuing partners. Parties.*
8. *Agency.*

II. SUITS AGAINST AND RIGHTS OF CREDITORS.

I. RIGHTS OF PARTNERS AS AGAINST EACH OTHER, AND SUITS BETWEEN.

I. (1) *Dissolution brought about by bad faith.*

The plaintiff and defendants were partners. The defendants, before the expiration of the term, induced the plaintiff to agree to a dissolution ; a valuation of the assets was thereupon made by the defendants and a settlement took place founded on such valuation under the erroneous impression on the part of the plaintiff, that one of the defendants was to retire from the business and that the interest of the other defendant in the valuation was identical with the interest of the plaintiff : while the fact was that the defendants had entered into a private agreement that after settling with the plaintiff the stock should be sold for the joint benefit of the defendants, and that they should share equally the proceeds and carry on the business : *Held*,

that by reason of this deceit the transaction was not binding on the plaintiff. *O'Connor v. Naughton*, 14 Grant, 428.

I. (2) *Statute of limitations.*

In partnership suits the defence of the Statute of Limitations is not available unless six years have elapsed before the filing of the bill since the dealings of the partners wholly ceased. *Storm v. Cumberland*, 18 Grant, 45.

I. (3) A partnership was formed between two civil engineers and architects, the profits of which were to be divided in shares of three-fifths and two-fifths. During the continuance of the partnership they invested moneys of the partnership in the purchase of real estate, which resulted in a loss: *Held*, that the loss was to be borne by the partners in the same proportion as they were to share the profits and loss of their other business. *Ib.*

I. (4) *Agreement acted on, not signed by one partner.*

Several proprietors of salt wells entered into an undertaking to sell their products through trustees, and in no other way; and a written agreement to this effect was executed by all the parties, except one, who was resident in England, and carried on his business here through an agent; the business was carried on under the agreement, notwithstanding his non-execution of the deed, and one of the other parties having subsequently attempted to act in contravention of the agreement, it was *held* that the delay of the absent party to sign the contract could not be set up as an answer to a motion for an injunction restraining the contravention. *The Ontario Salt Co. v. The Merchants' Salt Co.*, 18 Grant, 551.

I. (5) *Statute of Frauds, Delay, &c.*

A partnership was formed between three persons *A*, *B* and *C*, to dig for gold on the property of one Allan; two of them *A* and *B* were to do the work and the third *C*, to pay the expenses; all three were to share in the profits. The place so named was afterwards abandoned by mutual consent and the two working partners *A* and *B* removed at the instance of the

third *C* to a lot in another township (Elzevir), where they resumed work, *C* paying expenses as before: *Held*, that in the absence of any express agreement, it was to be presumed they were working on the same terms as at the place originally named.

The plaintiff had occasion to leave the work on the 2nd March, and did not return. He filed a bill to enforce his partnership rights on the 30th July: *Held*, that as there was no stipulation respecting the time he was to work, and he was not requested to resume work and no notice was given him of any complaint or intention to exclude him from the profits of the adventure, the delay did not bar the suit.

C in his own name bought the privilege of digging for gold on the Elzevir lot, and subsequently formed a company by whom that lot was purchased; *Held*, that the plaintiff one of the working partners was entitled to a share of all the profits and advantages made by *C* in this transaction.

There was no writing signed by *C* acknowledging the agency and trust; but it was *held* that *A* and *B* having entered and worked on the lot, the Statute of Frauds did not apply. *Burn v. Strong*, 14 Grant, 651.

I. (6) *Costs in suit between.*

In a partnership suit, the reference embraced private as well as partnership transactions; there were no partnership assets; the suit did not involve the administration of a partnership estate; the defendant claimed a large balance to be due to him, while the result had been a report for \$418.74 in favour of the plaintiff; and there were no special circumstances in favour of the defendant: the Court charged him with the costs of taking the account. *Woolans v. Vansickle*, 17 Grant, 451.

I. (7) *Partners retiring to be indemnified by the continuing partners—Parties.*

Circumstances under which retiring partners held to be so entitled. *Harper v. Knowlson*, 2 E. & A. R., 253.

I. (8) *Agency.*

A member of a partnership firm cannot bind his co-partner for transactions out of the usual scope of the business of the co-partnership; nor for things which are sometimes done by it but are of unusual or rare occurrence; where, therefore, one member of a mercantile firm, without the knowledge of his co-partner, purchased lands from a debtor of the firm in his own name which were subject to incumbrances, and for the purpose of discharging such incumbrances gave promissory notes signed by him in the name of the firm, but without the knowledge of his co-partner, the partnership was *held* not liable to pay the notes, although it was alleged that the arrangement had been effected for the purpose of more effectually securing the debt due the firm. *Fraser v. McLeod*, 8 Grant, 268.

II. SUITS AGAINST AND RIGHTS OF CREDITORS.

This Court has jurisdiction, and will exercise it, to prevent a creditor of one partner obtaining an undue preference over the creditors of a firm by means of proceedings in this Court. Where, therefore, a purchaser at Sheriff's sale of the interest of one partner filed his bill for an account and a receiver, and the receiver obtained possession of the stock-in-trade; leave was granted to a creditor of the firm to take proceedings in insolvency, and the receiver was directed to hand over the assets to the assignee in insolvency when he should be appointed. *Felan v. McGill*, 3 Cham. R., 68

Money borrowed by a partner with the knowledge and assent of his co-partner, is not necessarily chargeable by the creditor against the latter. For that purpose, it must appear that the money was borrowed on partnership account, or used for partnership purposes. *Hamilton v. McIlroy*, 15 Grant, 332.

A mortgage with distress clause, by the legal owner of property of which, at the time, he is in possession, and to all appearance in sole possession, is valid at law and in equity against an unknown partner, whose only claim to the possession,

when the mortgage was executed, was as tenant at will. *Mason v. Parker*, 16 Grant, 230.

A bill was filed to establish a partnership ; and, the partnership being proved, the usual accounts were directed, including an account of the claims of creditors : *Held*, that the costs of the suit should not be paid out of the fund to the prejudice of creditors. *Bingham v. Smith*, 16 Grant, 373.

PART PERFORMANCE.

See SPECIFIC PERFORMANCE.

PATENT FOR INVENTION.

The invention of an inclined plane in a certain form and position, as a means or appliance for directing a tool cutter, so as to produce spiral or curved grooves in a roller, was *held* a proper subject for a patent ; the simplicity of a new contrivance being no objection to a party's right to a patent for it.

A machinist invented a machine in which an inclined plane was applied for a novel purpose ; he contemplated further improving his invention, but meanwhile made use of it in his workshop. Five years or more afterwards he adopted or invented a contrivance which was not new but which in connection with the inclined plane increased greatly the value of the machine ; and he then took out a patent for the improved machine. *Held*, that notwithstanding his prior use of the original machine, the patent was valid, and that the patentee was entitled to the exclusive use of the inclined plane. [MOWAT, V.-C., dissenting.] *Summers v. Abell*, 15 Grant, 532.

The plaintiff had obtained a patent for an improved gearing for driving the cylinder of threshing machines ; and the gearing was a considerable improvement ; but, it appearing that the same gearing had been previously used for other machines, though no one had before applied it to threshing machines, it was

Held [affirming the decree of the Court below,] that the novelty was not sufficient under the Statute to sustain the patent. *Abell v. McPherson*, 18 Grant, 437.

The plaintiff introduced into a drum stove in addition to a spiral flue, which had been previously in use, a centre pipe closed at the sides and open at both bottom and top as a means of producing a greater amount of heat, and obtained a patent for "the spiral flue in connection with the pipe in the centre." *Held*, that the plaintiff's improvement did not involve any new principle or new combination, and that the patent was void. *North v. Williams*, 17 Grant, 179.

During the existence of a license the licensee cannot dispute the validity of a patent obtained by him, and afterwards assigned by him for value to another. *Whiting v. Tuttle*, 17 Grant, 454.

PAYMENT OF MONEY.

Where money collected by the Sheriff had been posted on the evening of the 27th November, addressed to the plaintiff's solicitor, but not received by him till after the defendants had moved for a stay of proceedings: *Held*, that the money was constructively in the possession of the plaintiff's solicitor as soon as it had been duly mailed; and therefore a motion to refund it was refused with costs. *McDonell v. McKay*, 2 Cham. R., 354.

Payment of money out of Court.

Where a certain sum of money ordered to be paid to the plaintiffs under a decree had, pending a re-hearing and appeal, been paid into Court by arrangement between the parties, to obtain a stay of proceedings, in lieu of the security required by sub-sec. 4, of sec. 16, of the Act relating to appeals; and on the appeal the decree was affirmed only in part, that part directing the payment of the money, being in part reversed by the amount being reduced to a comparatively small sum; a motion to pay out the money to the party who had paid it in was granted by

the Secretary, though strenuously opposed, and his order was confirmed on appeal to the full Court. *Lindsay Petroleum Company v. Hurd*, 3 Cham. R., 16.

PERSONAL REPRESENTATIVE.

Where the interest (if any) of a deceased party is very small, the Court will not require a personal representative to be appointed. *Montgomery v. Douglas*, 14 Grant, 268.

PETITION OF REVIEW.

A debtor made an assignment of certain real estate to B., a creditor, the deed being absolute in form, but intended as a security for the debt, and the debtor afterwards became bankrupt under the Statute 7 Victoria, chapter 10. Many years subsequently he filed a bill against the mortgagee's administrator for an account, &c. The administrator, being ignorant of the bankruptcy, consented to a decree, referring it to the Master to take the necessary accounts on the footing of the assignment being a security; but on afterwards discovering the fact of the bankruptcy, he filed a petition setting up the bankruptcy, and claiming relief against the decree. *Held*, that the consent to the decree was no bar to relief; and that the decree should be set aside, and the bill dismissed with costs, unless the assignee in bankruptcy was willing to adopt the suit and become bound by it. *Hatch v. Ross*, 15 Grant, 96.

The Court has jurisdiction in a proper case to entertain an application by a party served with an office copy of the decree under the general orders of June, 1853 (No. 6, rule 6), after the expiration of the 14 days thereby limited.

To support an application after the time limited for leave to file a petition of review, the longer the delay has been, and the less satisfactorily it is explained, the stronger the case should be on the merits; where, after five month's delay, an application was made to impeach the will on which the decree was

founded, and the application was supported by affidavits of belief only, in addition to statements which, though uncontradicted, would not be sufficient to avoid the will, the Court refused the application with costs. *Stewart v. Hunter*, 2 Cham. R., 265.

Where a petition of review is filed on the ground of new matter, the respondents may file affidavits without leave, as in the case of other petitions. On the case coming on, the Court, instead of then deciding the issues of fact raised by the affidavits, may direct a special answer to be filed, with a view to the more convenient trial of the question at issue, where this course seems expedient. *Robson v. Wride*, 14 Grant, 606.

There is no rule that a petition of review, on the ground of the discovery of new evidence, will not lie when the new evidence is of conversations and admissions. *Brouse v. Stayner*, 16 Grant, 1.

PLEADING.

See HUSBAND AND WIFE—PRACTICE.

I. ANSWER.

II. BILL.

III. DEMURRER

IV. INFORMATION.

V. PARTIES.

VI. PETITIONS.

I. ANSWER.

A bill was filed setting up an equitable right to land, and alleging that the defendant who had obtained the legal title, purchased the property with notice of the plaintiff's equity; the defendant, by his answer, said that at the time of his purchase, he had no notice of the plaintiff's claim, and the consideration he had paid was actual and *bona fide*; but he did not negative notice before paying his purchase-money or receiving the conveyance; and did not prove payment of any

consideration. *Held*, that by reason of these defects, his defence failed. *Prince v. Brady*, 16 Grant, 375.

The defendant applied at the hearing, for leave to put in a further answer setting up the necessary facts, and that the title was a registered title, and to prove consideration. But it appearing that the plaintiff had been long in possession, and had made very considerable improvements before the defendant's purchase, and that the defendant, though he may not have had notice of the plaintiff's claim, had, in this purchase, shown culpable disregard of the rights of third persons, the application to supply the defective allegations and proof was refused. *Ib.*

Statute of Frauds.

Where a defendant denies an alleged agreement of which a plaintiff seeks specific performance, the defendant should claim the benefit of the Statute of Frauds in order to exclude parol evidence of the contract. *Butler v. Church*, 16 Grant, 205.

Quære, whether, in order to exclude parol evidence of a contract, it is necessary for a defendant who denies the contract, to claim the benefit of the Statute of Frauds. S. C., 18 Grant, 190.

Stated Account.

Where a defendant by his answer sets up a stated account, the plaintiff does not admit the defence by bringing on the cause by way of motion for decree; and the proper decree in such a case is a reference as to such alleged account. *Neill v. Neill*, 15 Grant, 110.

Charges of Fraud.

Charges of fraud do not justify answering a demurrable bill; and where the defendant to such a bill answered, and the cause went to a hearing, the bill was dismissed without costs. *Suunders v. Stull*, 18 Grant, 590.

Supplemental answer.

A supplemental answer was allowed to be filed upon terms, where new matter had been discovered since former answer

filed, and the delay in making the application was accounted for. *McKinnon v. McDonald*, 2 Cham. R., 23.

A supplemental answer will be allowed to be filed to correct an error in the original answer, or state some facts discovered since answer filed, although some delay has taken place since the discovery of the new matter ; and all the more readily if the plaintiff has himself not been urgent in pressing the cause. *Worts v. How*, 2 Cham. R., 111.

II. BILL.

Where the locatee of the Crown assigned his interest absolutely, and the purchaser gave his bond for the purchase money, payable if the title should prove good, it was *held*, that a bill was wrong in treating the transaction as a contract and praying specific performance ; and that the bill must be amended and a lien prayed, in order to entitle the vendor to relief. *Sanderson v. Burdett*, 16 Grant, 119.

A bill against an Insurance Company on a policy, alleged that the policy was made by the Company, but did not state that it was under seal : *Held*, sufficient. *Workman v. The Royal Insurance Co.*, 16 Grant, 185.

The policy was stated to be to pay such loss or damage as should happen to the property by fire, "subject to the conditions thereon indorsed : " *Held*, that the language did not imply that the conditions were conditions precedent, and therefore that it was not necessary to shew due performance. *Ib.*

A bill, setting forth that one of the defendants procured a conveyance from the plaintiff by fraud, and afterwards mortgaged the property to another defendant, is not demurrable for want of a charge that the latter had notice of the fraud at or before he received his mortgage. It is for the defendant, in such a case, to set up the defence of no notice. *Kitchen v. Kitchen*, 16 Grant, 232.

A bill will lie in equity, at the suit of a creditor, to enforce the double liability of the shareholders of an insolvent company.

But such a bill must be on behalf of the creditors. *Brooks v. The Bank of Upper Canada*, 16 Grant, 249.

Where the bill alleged facts which shewed that the lands in question had been sold by the mortgagee under a power of sale in his mortgage for less than one-fifth the value, and alleged that the mortgagee, "intending to acquire title himself to the said lands * * * caused the said lands to be sold for the nominal sum of \$409 to one G, who paid no consideration therefor, and on the same day conveyed the same to the defendant *Ann Watt*, the wife of the mortgagee;" that "*Ann Watt* had paid no consideration for the pretended sale and conveyance of the said lands to her, and was well aware that the said sale and conveyance took place for the purpose of depriving the plaintiff of her just rights in the premises:" Held, this sufficiently alleged the mortgagee's intention to become himself the purchaser. *Spain v. Watt*, 16 Grant, 260.

Where a widow is made a defendant as being entitled to dower it is not sufficient for the bill to allege that the husband died leaving her his widow: the bill should further expressly aver that she is entitled to dower and that she claims to be so entitled. *Martin v. McGlashan*, 15 Grant, 485.

In a bill to enforce a trust, it is not necessary to allege that there is any evidence in writing of the trust. *Smith v. Ross*, 15 Grant, 374.

A bill set forth the plaintiff's title to land by mesne conveyances from the grantee of the Crown; the bill stated that the plaintiff had gone into possession, not saying when, and not saying that any of the parties through whom he derived title had been in possession: the bill alleged that the defendant pretended to be able to establish title to the land by possession as the assignee of one *E K*; and that *E K* was for a short period (not saying how long) in possession; the bill charged that the conveyance to the defendant was a cloud on the plaintiff's title, and prayed the usual relief; the bill was taken *pro confesso*: but held, that its allegations were insufficient to entitle the plaintiff to a decree. *Carson v. Cryslar*, 16 Grant, 499.

A bill charging a defendant with fraud, and not praying relief against him as to costs or otherwise, is demurrable. *Saunders v. Stull*, 18 Grant, 590.

A bill was filed praying a declaration of the true construction of a will, and for an administration of the estate by the Court. The bill was taken *pro confesso* against some of the defendants. At the hearing, the plaintiff wished to abandon the prayer for an administration of the estate, but one of the defendants, who was a legatee, objected: *Held*, that he was entitled to a decree for administration as prayed. *Woodside v. Logan*, 15 Grant, 145.

An execution creditor of *A* filed a bill impeaching a conveyance made by the debtor to *B*, as fraudulent against creditors: alleging that to give colour to the impeached transaction, notes had been delivered by the grantee to the debtor's wife, for the pretended consideration of the conveyance; the parties falsely pretending that the property was hers. The bill prayed an injunction against the notes being paid or parted with until decree and claimed a lien thereon in case the sale to *B* was not fraudulent. The debtor, his wife, and their grantee, were the defendants to the bill: *Held*, that the bill was not multifarious.

Whether, in case the sale to *B* was upheld, the plaintiff was entitled to the alternative relief—*Quære*. *Goetler v. Eckersville*, 15 Grant, 82.

Parol evidence is not admissible to shew that by mistake the written agreement did not express the true agreement, unless mistake is expressly charged. *McDonald v. Rose*, 17 Grant, 657.

So long as a judgment at law, although irregularly entered up, remains a record of the Court in which it has been recovered, and neither fraud nor collusion in obtaining the judgment is alleged, a bill to impeach it in this Court, on the ground of irregularities, will not lie. *Tait v. Harrison*, 17 Grant, 458.

On a question arising on a demurrer as to whether a bill to redeem should contain an offer to redeem. *MOWAT*, V.-C. decided that it need not. *Pearson v. Campbell*, 2 Cham. R., 12.

Husband and Wife.

A husband and wife may jointly maintain one bill for specific performance of a covenant made by them for the sale of land of the wife ; but the wife must sue by her next friend. *Jessop v. McLean*, 15 Grant, 489.

III. DEMURRER.

The plaintiff, a second mortgagee, filed his bill against the equitable owner of a prior mortgage, impeaching an alleged sale of the lands comprised in the plaintiff's mortgage, under a power of sale contained in such prior mortgage, as also a Sheriff's sale of a portion of the mortgaged premises, and the purchasers thereat were made defendants. A demurrer by the equitable owner of the prior incumbrance for want of equity, and for multifariousness, was over-ruled. *McLaren v. Fraser*, 15 Grant, 239.

The plaintiff filed his bill against *M* and *B*, claiming to be entitled to certain mortgage moneys as against *B*, which were payable by *M*; the only contest being between the plaintiff and *B*, an injunction was prayed to restrain *M* from paying, and *B* from receiving them, and *M* was made a party solely for this purpose: *Held*, that *M* was a proper party to the suit, and a demurrer by him for multifariousness and want of equity was over-ruled. *McKenzie v. Brown*, 15 Grant, 399.

A bill was filed in respect of certain timber limits by two of the devisees and legatees of the original licensee thereof: *Held*, that the suit ought to be by the personal representative, and a demurrer to the bill, on the ground that it was not so constituted, was allowed. *Bennett v. O'Meara*, 15 Grant, 396.

A third mortgagee filed his bill for redemption against the two prior incumbrancers and the mortgagor, but did not allege either that his own mortgage or that of the second mortgagee was past due: a demurrer on these grounds by the second mortgagee was allowed. *Parsons v. The Bank of Montreal*, 15 Grant, 411.

Where a bill had been filed against an alleged trustee for breach of trust, which it was stated in the bill consisted of the

sale, and receipt by him of the proceeds of certain real estate, which by the terms of the trust he was to sell absolutely, and hold the proceeds on the trusts specified, it was *held*, that such a bill could only be sustained by the personal representative of the *cestui que trust*.

A demurrer for want of equity to a bill by the next of kin was in such a case allowed with costs. *Allan v. Gamble*, 3 Cham. R., 105.

IV. INFORMATION.

See INFORMATION.

Signature to.

There is no precedent for dispensing with the signature of the Attorney-General to an information.

Where, in the absence from the Province of the Attorney-General, an information was filed without signature, but having endorsed thereon a fiat signed by the Solicitor-General, it was ordered to be taken off the files. *Attorney-General v. Toronto Street Railway*, 2 Cham. R., 165.

V. PARTIES.

A bill was held to lie by a corporator of the Church Society of the Diocese of Toronto, on behalf of himself and all other members of the Society, to correct and prevent alleged breaches of trust by the Corporation. To such a bill the Attorney-General is not a necessary party. *Boulton v. The Church Society of the Diocese of Toronto*, 14 Grant, 123; affirmed on Appeal, 15 Grant, 450.

The corporation of the local municipality is not a proper party to a bill impeaching a tax sale. *Mills v. McKay*, 14 Grant, 602.

A party entitled, as a residuary devisee, filed a bill against one of three persons named as executors and trustees, praying to have the trusts of the will carried out; alleging that the other two persons named as executors and trustees, had re-

nounced probate of the will, and had never acted in the matter of the trusts thereof. The defendant's residence was unknown to the plaintiff, and service had been effected by advertisement, under the General Orders; the bill was taken *pro confesso*, and there was no evidence, other than such admission of the defendant, as to the other parties having renounced or refused to act. The Court, on this state of facts, refused to make any decree in the absence of the co-executors. *Lane v. Young*, 17 Grant, 100.

The fact that a person, interested in the subject matter of a suit, is resident out of the jurisdiction of the Court, is not a sufficient reason for not making such absent person a party. *Munro v. Munro*, 17 Grant, 205.

Where a devisee of land subject to a charge, mortgaged the devised property, the mortgagees were held to be proper parties to a suit for the realization of the charge. *Goldsmith v. Goldsmith*, 17 Grant, 213.

The trustees of the Bank of Upper Canada were held necessary parties to a bill by creditors to enforce the double liability of shareholders. *Brooke v. The Bank of Upper Canada*, 17 Grant, 301.

A bill being filed by the holder of debentures, issued by the defendants, and payable to bearer, to enforce payment of the debentures, the Company by answer objected that the person to whom the debentures were issued, was a necessary party to the suit, but did not name the person. *Held*, that the Company must be presumed to know who this person was, that there was no presumption that the plaintiff knew him, and that the person not being named in the answer, the objection could not be insisted on at the hearing. *Woodside v. The Toronto St. R. R. Co.*, 14 Grant, 409.

Legatees are not necessary parties defendant to an administration suit. *Harrison v. Shaw*, 2 Cham. R., 44.

When a judgment has been recovered *pendente lite*, it is not necessary to make the judgment-creditor a party. *Wallbridge v. Martin*, 2 Cham. R., 275.

A bill was filed to administer an estate, and declare a legacy for religious purposes void. The trustees were made defendants ; but a question arose whether the Attorney-General ought not also to have been made a defendant. *Held*, that the Attorney-General was a necessary party. *Long v. Wilmotte*, 2 Cham. R., 87.

Whenever the result of a suit, whatever it may be, will not prejudice the Crown, and there is therefore no interest of the Crown to be protected, the Attorney-General is not a necessary party. *Bennet v. O'Meara*, 15 Grant, 396.

VI. PETITION.

A petition should set out the addition and description of the petitioner in the same manner and with the same certainty as a bill of complaint. *Hunter v. Mountjoy*, 2 Cham. R., 90.

The bill of a subsequent incumbrancer stated a completed transaction. The mortgagees, through oversight, allowed the bill to be taken *pro confesso*, and a decree was made accordingly. The plaintiff subsequently desiring more extensive relief, filed a petition in the nature of a bill of review in order to obtain the same. The mortgagees, in their answer to the petition, set up the facts which shewed the transaction to be not completed. The Court considered the whole case to be re-opened by this petition, and decided that the sale to their vendee did not affect the rights of the mortgagees, and that they were chargeable only with the amount actually received from the purchaser. *The Bank of Upper Canada, v. Wallace*, [In Appeal] 16 Grant, 280.

Petition under 29 Vic. chap. 28, sec. 31.

An administrator was desirous of converting saw logs into lumber for the benefit of the estate he represented. An application under 29 Vic., chap. 28, sec. 31, was entertained and an opinion of a judge given in favour of the course suggested. *Re Caldwell Estate*, 2 Cham. R., 150.

POSSESSION.

See STATUTE OF LIMITATIONS—MORTGAGE I. 7-16—QUIETING TITLES.

On moving for an order for delivery of possession it must be shewn that the defendant is in possession. No order will be made against a tenant or third party in possession, not a party to the cause. *Mackenzie v. Wiggins*, 2 Cham. R., 391.

General Order 454 applies only to mortgage cases, and not to suits for specific performance. *Chisholm v. Allen*, 2 Cham. R., 411.

Where costs were not asked for by the notice on an argument, and no demand of possession was proved, the order for delivery of possession was made without costs. *Mills v. Choate*, 2 Cham. R., 374.

A motion for delivery of possession must be made on notice *Buckley v. Ouillette*, 2 Cham. R., 439.

Possession by an adverse claimant is no notice of his interest, to a person parting with the estate. *Beck v. Moffatt*, 17 Grant, 601.

Where a father and son lived together on certain land of the father and continued to do so after a conveyance by the father to the son, it was held that the son's possession after the conveyance did not affect a subsequent purchaser from the father.

Possession is not such notice as under the late Registry Act, postpones a registered deed to the prior unregistered title of the party in such possession. *Sherboneau v. Jeffs*, 15 Grant, 574.

The son of an intestate and his wife, being in undisturbed possession of certain land of the intestate long enough for the possession to have ripened into a title in one or the other; and it appearing that it was farmed and improved by the husband, and assessed in his name, and the claim of the wife thereto had not been set up until after her husband had fallen into difficulties, and such claim rested only upon the statement of the in-

testate, made after the title had ripened in some one, that he had, in his own waggon, conveyed the wife of his son to the land while the son was absent, and left her in possession. *Held*, that the possession was that of the son : and that his title vested in his assignee in insolvency. *Filman v Filman*, 15 Grant, 643.

Order for delivery.

An application for an order for possession cannot be made the means of trying the right to possession between a landlord and his tenant or a trespasser. Where, therefore, a mortgagor's tenant had attorned to the mortgagee, and afterwards such tenant left the premises, and they fell into the hands of another party, an order for possession against such party was refused. *Scott v. Black*, 3 Cham. R., 323.

POSTPONING HEARING.

1. When a motion to postpone the hearing of a cause was made before the Secretary on the same day the cause was to be heard in an outer county, he refused the application. *McEwan v. Orde*, 2 Cham. R., 280.

2. It is the practice to make the costs of postponing the hearing of a cause, where sufficient grounds are shewn for such postponement, costs in the cause.

The engagement of a witness, who was a Senator of the Dominion, and a member of the Executive Council at his duties at Ottawa, where the Senate was in Session, was deemed sufficient excuse for not procuring his attendance, and good grounds for putting off the hearing. *Rees v. Attorney-General*, 2 Cham. R., 386.

3. A motion was granted for postponing hearing and examination on the grounds of the absence of a material witness, after notice of hearing had been given, although the cause had been at issue for some months previous. The costs for such a motion are costs in the cause. *Graham v. Machall*, 2 Cham. R., 376.

4. When a commission to take evidence abroad could not be executed in time, by reason of the illness of the Commissioner, the plaintiff was allowed further time to set the cause down for examination and hearing. *McIntyre v. Canada Company*, 2 Cham. R., 464.

POWER OF ATTORNEY.

To Creditor—Irrevocable.

A person intending to take out letters of administration to the estate of a mortgagee, executed a power of attorney authorizing the person therein named to receive mortgage money; letters of administration were subsequently obtained as contemplated: *Held*, that the power was effectual with regard to sums received by the appointee after the issue of the letters. *Sinclair v. Dewar*, 17 Grant, 621.

In such a case, the appointee was a creditor of the intestate, and the power was given upon a verbal agreement on the part of the administratrix that the appointee should pay himself out of any moneys he might receive, and the appointee accepted the power on that condition: *Held*, that, until the debt was paid, the power was irrevocable. *Ib.*

POWER OF SALE.

See MORTGAGE.

PRACTICE.

MISCELLANEOUS QUESTIONS OF PRACTICE.

See PLEADING, and see the subject to which the point of practice relates.

1. *Motion for decree.*
2. *Money in Court for benefit of legatee.*
3. *Bill not complying with orders.*
4. *Bill remaining on the file unserved.*
5. *Costs of former application.*

6. *Lost policy.*
7. *Trying question of fact.*
8. *Paying mortgage money out of Court.*
9. *Married Woman.*
10. *Foreclosure or sale.*
11. *Custody of Children.*
12. *Filing Supplemental answer.*
13. *Answer irregularly transmitted.*
14. *Trying title at hearing.*

1. *Motion for decree.*

On a motion for decree, the plaintiff was assumed, for the purposes of the motion, to admit all the statements of the answer of which proof would be receivable at a hearing in term. *Wilson v. Cossey*, 14 Grant, 80.

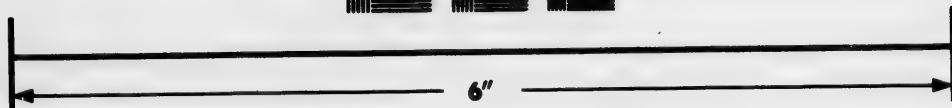
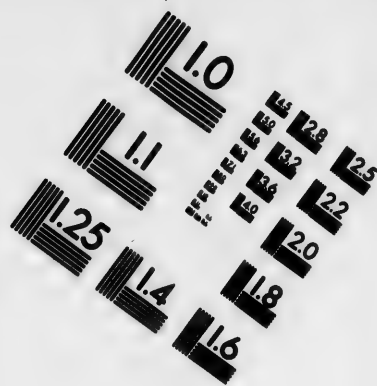
A bill for redemption alleged that an absolute conveyance which the plaintiff had executed, was intended as a security for a debt then due by the plaintiff; the defendants admitted that the conveyance was intended as a security, but alleged that it was to secure future advances, as well as the existing debt, and interest at twelve per cent. The plaintiff moved for a decree on the answer:

Held, that the defendant was entitled to a declaration that the security was to cover the future advances, and twelve per cent. interest, as well as the existing debt; but the Court gave leave to the plaintiff to abandon his motion, and to file a replication and proceed to a hearing in term, if he chose. *Ib.*

The defendants, by their answer, specified a certain sum as the amount of the debt due at the time the conveyance was executed, and certain other amounts, as admitted by the plaintiff to be due at subsequent periods: *Held*, that, on a motion for decree, these allegations were not binding on the plaintiff, and that they must be established before the master. *Ib.*

2. *Money in Court for benefit of legatee—Jurisdiction, &c.*

Where the amount of a legacy had been paid into Court, and the will directed that the legacy together with a house and lot



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also devised to the same person, should be held for the benefit of the legatee independently of her husband, she receiving the rents, interest, and profits: on a motion to have the money paid out, or that it might be invested in the purchase of a farm for the legatee's benefit: the Referee held it to be in the jurisdiction of the Court to make such an order, and granted the application as to the purchase of the farm, refusing it as to the paying the money to her absolutely. *Re Trusts of Turner's Will, ex parte Seaton*, 3 Cham. R., 259.

" *Bill not complying with orders.*

Where a bill had been filed, not complying with the Orders, the dates not being expressed in figures, although the bill was printed and not being in pica type nor of the usual size as required by the Orders, the service of a copy of it was set aside, the fact of the Deputy Registrar receiving and filing it, not being deemed a bar to the motion. *Cossey v. Ducklow*, 2 Cham. R., 227.

4. *Bill remaining on the files unserved.*

Where a bill has been filed and a *lis pendens* registered, but no office-copy served within the twelve weeks allowed for service, the bill was ordered to be dismissed with costs. *Somerville v. Kerr*, 2 Cham. R. 154.

5. *Costs of former application.*

Non-payment of the untaxed costs of an unsuccessful application in a former suit is no bar to a motion for a like purpose in another suit between the same parties. *The Erie and Niagara Railway Co. v. Galt*, 15 Grant, 567.

6. *Lost policy.*

In a suit against an Insurance Company on a policy, the bill alleged that the policy had been destroyed: Held, that an affidavit of the fact must be annexed to the bill. *Workman v. The Royal Insurance Co.*, 16 Grant, 185.

7. *Trying question of fact.*

A Judge of the Court will, when it appears conducive to the interest of suitors, and a saving of expense, instead of directing an issue, himself try a question of fact arising on an application before him in Chambers. *Robertson v. Grant*, 3 Cham. R., 331.

8. *Paying mortgage money out of Court.*

Where defendant refused to consent to payment out of mortgage money, plaintiff obtained an order for such payment, but at his own expense. *Bernard v. Alley*, 2 Cham. R., 91.

A power of attorney, or other written authority, is necessary to authorize the payment of money out of Court to the solicitor, even though the parties to whom it is coming are numerous, and not resident in America.

The additional circumstances of the money having been realized from the sale of property mortgaged to secure negotiable debentures, which were in the possession of the solicitor since the institution of the suit, *held* not to dispense with the necessity for a power of attorney. *Swan v. Marmora Iron Works Co.*, 2 Cham. R., 155.

9. *Married Woman.*

Before an order for a married woman to answer separately will be made, it must be shewn that an office copy of the bill has been served on her. *Anonymous*, 1 Cham. R., 9.

10. *Foreclosure or Sale.*

Where the prayer of the bill is in the alternative for either sale or foreclosure, the Court will at the instance of the plaintiff make a decree for sale, and in the event of a sale failing to produce sufficient to cover the claim of the plaintiff, order foreclosure. *Blachford v. Oliver*, 8 Grant, 391.

The orders of June, 1861, do not entitle a defendant to insist upon a sale instead of a foreclosure against the consent of the mortgagee without paying in the usual deposit upon his undertaking the conduct of the sale. The object of the order was to enable the Court to grant the defendant that indulgence,

upon the consent of the plaintiff in cases where the plaintiff desired to bid at the sale. *Taylor v. Walker*, 8 Grant, 506.

11. *Custody of children.*

On a bill by a wife for alimony and the custody of children who are under 12 years of age, the Court has jurisdiction to grant the latter relief without a petition. *Munro v. Munro*, 15 Grant, 431.

12. *Filing supplemental answer.*

A motion for leave to file a supplemental answer must be made in Court. *Attorney-General v. Casey*, 2 Cham. R., 279.

13. *Answer irregularly transmitted.*

The fact that an answer had been sworn before a commissioner, who had been formerly concerned as solicitor in the cause, was not held to be ground for taking the answer off the files : but where an answer had been irregularly transmitted, it was ordered to be resworn within a given time, with costs against the defendants. *Gordon v. Johnson*, 2 Cham. R., 205.

14. *Trying title at hearing.*

In a partition suit, a question of title raised between co-defendants was decided at the hearing and without being referred to the Master. *Wood v. Wood*, 16 Grant, 471.

PRINCIPAL AND AGENT.

THE SUBJECT GENERALLY.

1. *Agent receiving mortgage money.*
2. *Trustee.*
3. *Fraud. Res adjudicata. Costs.*
4. *Bank stock.*
5. *Indemnity.*
6. *Trust in foreign lands.*
7. *Costs.*
8. *Liability of agent.*

9. *Compensation.*10. *Adoption of contract.*1. *Agent receiving Mortgage money.*

A had authority to collect rent, and to contract for the sale of property, and to receive the down payments. *Held*, that such authority did not entitle him to receive payments on a mortgage given for unpaid purchase money.

Where such an agent had at one time, without authority received some payments on such mortgage, which the principal did not publicly repudiate, and another mortgagor who did not appear to have had notice of these payments, made a payment to the agent, on his mortgage, fourteen months after the agent had ceased to receive any mortgage money, such payment was held to be not a good payment. *Greenwood v. The Commercial Bank of Canada*, 14 Grant, 40.

2. *Trustee.*

At a sale of lands under a writ of execution, the nephew of the execution creditor, a person without means, attended at the sale, and bid off the property; and, on a subsequent day, produced to the Sheriff the receipt of the plaintiff in the writ for the amount bid at the sale, and paid the Sheriff his fees, who thereupon conveyed the lands sold to the nephew, who was allowed by his uncle to retain the title in himself. The uncle subsequently agreed for the sale and conveyance of this land to a purchaser who made default in completing the bargain, and the nephew wrote to his uncle pointing out the proper proceedings to be adopted to compel the purchaser to complete the contract. The uncle died without any further proceedings in respect of such contract, having by will, devised the property. The nephew, after the death of the uncle, set up a claim to be entitled to the property absolutely. On a bill filed by the devisee against the nephew, the Court declared the defendant to be a trustee, and ordered him to convey to the plaintiff. *McDonald v. McMillan*, 14 Grant, 99.

3. *Fraud. Res judicata. Costs.*

The plaintiffs and their father had been in possession of the lands in question about 20 or 30 years, the title, however, being all the while in another party. The plaintiff employed one of the defendants *A F*, to obtain a conveyance which he took in his own name for the avowed purpose of defeating the claim of one *P*, from whom a lease had been taken by the plaintiffs, and in a suit by *P* against the plaintiffs to establish his right to the land, one of them swore that the deed to the defendant (the agent) was *bona fide* and for his own benefit; and subsequently to the dismissal of the bill in that suit, the plaintiffs took a lease of the premises from *A F*: *Held*, that the circumstances did not preclude the plaintiffs from establishing the agency of *A F*, and afterwards shewing themselves entitled to the land as owners, and that the dismissal of the bill in *P*'s suit was not *res judicata* of the question involved in this, but under the circumstances, the Court while granting to the plaintiffs the relief to which they proved themselves entitled, refused them any costs of the proceedings to establish their right. *Washburn v. Ferris*, 14 Grant, 516.

4. *Bank stock.*

A trustee or agent has no right to invest in Bank stock without authority, but that rule does not apply where the *cestui que trust* or principal is of full age and competent in point of law to act for himself, and gives his sanction to such investment. It is a settled rule that a trustee or agent authorized to make a purchase for his *cestui que trust* or principal cannot make the purchase from himself without disclosing the fact. Such transactions are so dangerous that they are wholly forbidden and are not merely declared void where damage has arisen from them, or fraud was mixed up with them.

Accordingly, where an agent, authorized to invest in Bank stock appropriated to his principal some shares of his own and rendered an account as if he had purchased so many shares for her, his principal, years afterwards on the fact coming to her knowledge, was *held* entitled to repudiate the transaction, without any inquiry as to the fairness of the rate which she had

been charged for the shares. *Harrison v. Harrison*, 14 Grant, 586.

5. *Indemnity.*

A school trustee, by desire of the board, attended an auction, and bought for the board a piece of property for a school-site, and he signed the contract with his own name only. The board afterwards, by several resolutions, during three years, unanimously recognized the purchase as their own, and paid three instalments of the purchase money. In an estimate under the corporate seal, the board applied to the town council for money to pay "for school premises for a central-school, contracted for and agreed to be paid \$1,570; for building a central school-house on said purchased premises, \$7,870." It was shewn that there was no other property or contract to which this language could refer than the property or contract mentioned. The town council did not comply with the requisition, and ultimately trustees were elected, a majority of whom determined to repudiate the purchase: *Held*, in a suit against the board, by the person in whose name the purchase had been made, for indemnification in respect of the remainder of the purchase money, that the plaintiff was entitled to relief. *Smith v. The School Trustees of Belleville*, 16 Grant, 130.

6. *Trust in foreign lands.*

Where a trustee of lands situated in a foreign country is resident within this Province, the Court will decree an execution of the trust. *Smith v. Henderson*, 17 Grant, 6.

7. *Costs.*

A principal filed a bill against his agent for an account of his dealings, and the agent claimed by his answer that the principal was indebted to him. On taking the account, however, a balance was found against the agent of \$282. The Court ordered the defendant to pay the costs of the suit. *Id.*

8. *Liability of Agent.*

It is the duty of an agent to defend an action improperly in-

stituted against his principal: where therefore an insurance company had been carrying on business in this country, and having ceased to do so, paid off a clerk who was immediately employed by a firm of which the agent of the company was a member; notwithstanding which the clerk sued the company for his salary, and the agent allowed judgment in the action to go by default, and paid to the plaintiff in the action the amount of the judgment: *Held*, that the agent was not entitled to credit for the amount so paid on taking an account of his receipts and payments on behalf of the company: that the utmost to which he could be entitled to credit was the excess of the salary at which the clerk had been engaged by the company over and above what he had received in his new employment. *Jay v. McDonell*, 17 Grant, 436.

Where, on an insurance company relinquishing business, a quantity of office furniture was in the possession of the agent which was not forthcoming, it was *held*, that it was the duty of the agent to have made proper entries shewing what had become thereof; and in the absence of such proof that his estate was properly chargeable with its value. *Ib.*

9. Compensation.

R, who was engaged in the lumber business, employed *S* as his agent, and by letter agreed to pay him \$10 per 1,000 cubic feet on all timber that *S* manufactured for him, which rate (the letter said) "includes purchasing, superintending the making, and attending to the shipping of the same." *R* paying all travelling expenses. *S* bought a quantity of timber for *R* which was not manufactured under the superintendence of *S*: *Held*, that he was entitled to a reasonable compensation for this service; and there having been considerable delay in enforcing payment, caused by *R* having obtained an injunction restraining *S* from proceeding at law, it was *held* that he was entitled to interest on the amount of his claim. *Ridley v. Sexton*, 18 Grant, 580.

A paid agent whose duty it is to receive from other agents moneys due to the principal, is bound to take steps for the re-

covery thereof, unless he shows that had he taken proceedings to enforce payment, or that there was reasonable ground for believing that if proceedings had been taken, they would have proved ineffectual. *Ridley v. Sexton*, 18 Grant, 580.

10. *Adoption of Contract.*

A company was formed in England with a limited liability, for the purpose of carrying on business at Oshawa in this Province ; the managing director at Oshawa, without authority, contracted for the purchase of some real estate for the use of the company at Oshawa, and signed the contract as " Managing Director ;" for convenience the conveyance was made to the director personally, and he executed a mortgage for the unpaid purchase-money, and went into possession and used the property for the purposes of the company. The purchase was immediately communicated by him to the English directors, and they disapproved thereof, but did not act repudiating the purchase ; on the contrary, they directed the buildings to be insured. *Held*, that this conduct was an adoption of the contract by the directors ; that they had power to adopt it, and had the power of binding the company, and that the company were liable to the vendor for the purchase-money. *Conant v. Mioll*, 17 Grant, 574.

PRINCIPAL AND INTEREST.

See RECEIVER.

PRINCIPAL AND SURETY.

THE SUBJECT GENERALLY.

1. *Subrogation of right.*
2. *Recognizance.*
3. *Effect of giving time.*
4. *Release of debtor by mistake.*
5. *Discharge of surety.*
6. *Concealment of facts from sureties.*
7. *Lapse of time, &c. Municipal corporation. Treasurer thereof and his sureties.*

1. *Subrogation of right.*

S was surety to *B* for a debt, for which *A*, the principal debtor, gave a mortgage to *B* as a further security. The creditor recovered judgment against the surety, and sold his lands under execution. While the *fi. fa.* was in the sheriff's hands, and before the sale, *S* mortgaged the lands to creditors of his own : *Held*, that as the surety would, on paying the debt to *B*, have been entitled to the benefit of the mortgage which the principal debtor had given to *B*, so where the lands of *S* were sold to pay the debt, and the mortgagees of *S* were thereby deprived of them, these mortgagees were entitled to the benefit of the original mortgage as against any subsequent assignment of the mortgage by the mortgagee, and any subsequent mortgage by the mortgagor. *Quay v. Sculthorpe*, 16 Grant, 449.

2. *Recognizance.*

Two persons became bound for the due appearance of a person confined in gaol on a criminal charge, and the recognizance was prepared, as if the accused and his two sureties were to join therein ; but the magistrate discharged the prisoner without obtaining his acknowledgment of the recognizance : *Held*, that the sureties were liable. *Rastall v. The Attorney-General*. In Appeal, 18 Grant, 138, reversing 17 Grant, 1 [SPRAGGE, C., MOWAT and STRONG, V. CC., dissenting].

3. *Effect of giving time.*

After judgment had been recorded against a debtor and his surety, the party holding the judgment, entered into an agreement with the debtor, to extend the time for payment, and a bill was afterwards filed by the surety claiming to be discharged by reason thereof : *Held*, that under the circumstances the surety was not discharged. *Duff v. Barrett and Thornbury*, 15 Grant, 632.

On the rehearing of this cause, it was held by SPRAGGE, C. [MOWAT, V.C., *dubitante*], that time given by a creditor to his principal debtor after judgment recovered against the surety, did not discharge the surety ; and also that, independently of

that ground, the debtor having stipulated to obtain the surety's consent for time, the agreement for time was thereby made conditional on such consent being given, and that the surety was not discharged. S. C., 17 Grant, 187.

4. *Release of debtor by mistake.*

A creditor, by mistake, executed an absolute release to his debtor, but the agreement was that the creditor's right against a surety should be reserved: *Held*, that the surety was not discharged, and that the creditor was entitled to a decree in equity to that effect. [SPRAGGE, C., dissenting.] *Bank of Montreal v. M'Faul*, 17 Grant, 234.

5. *Discharge of surety.*

A surety cannot get rid of his liability on the ground of having become surety in ignorance of material facts, unless he can show that information was fraudulently withheld from him. *The Municipal Corporation of the Township of East Zorra v. Douglas*, 17 Grant, 462.

Mere negligence by the obligee in looking after the principal, in calling him to account, or in requiring him to pay over money, is no defence against either antecedent or subsequent liability of the surety. *Ib.*

A township council tacitly permitted the treasurer of the township to mix the township money with his own: *Held*, that this conduct was wrong, but did not discharge the treasurer's sureties. *Ib.*

The plaintiff who was endorser on a note made by one *McF* to a bank, shortly after the making thereof made a mortgage to the bank to secure the debt, which was stated in terms to be an additional security for the payment of the note and any renewal or renewals thereof. Subsequently the bank absolutely discharged the principal debtor: *Held*, (1) that the position of the surety was not changed by the making of the mortgage. (2) That the surety was discharged although it was shewn that by the agreement between the principal debtor and the bank, the

surety was still to be held liable. *Cumming v. The Bank of Montreal*, 15 Grant, 686.

6. *Concealment of facts from surety.*

To invalidate a bond given by sureties on the ground of material facts having been concealed from them until after they had executed the bond, it must appear that the concealment was fraudulent. *Peers v. Oxford*, 17 Grant, 472.

A county treasurer had, through a misapprehension of what was the proper course, been allowed for many years to mix all county money with his own, and had used for his private purposes a large sum received in that way; in this state of things he had occasion to give to the corporation a new bond with two new sureties, shortly after giving which, it was ascertained that he was unable to pay his balance to the corporation; and the sureties filed a bill to be relieved from their bond on the ground of the treasurer's misconduct and of the uncommunicated knowledge of that misconduct by the representatives of the corporation at the time the bond was given. But the Court, being of opinion that most of the facts relied on as proving misconduct were known to the sureties, and that no information had been withheld from them fraudulently, held the bond to be valid. *Id.*

7. *Lapse of time, &c., Municipal Corporation, Treasurer thereof, and his sureties.*

One of the sureties for the treasurer of a municipal corporation being desirous of being relieved from his suretyship, the treasurer offered to the council a new surety in his place; and the council thereupon passed a resolution approving of the new surety, and declaring that on the completion of the necessary bonds, the withdrawing surety should be relieved; no further act took place on the part of the council, but the treasurer and his new surety (omitting the second surety) joined in a bond conditioned for the due performance of the treasurer's duties for the future, and the treasurer executed a mortgage to the same effect; the clerk on receiving these gave up to the treasurer the old bond, and the treasurer destroyed it; eight years after-

wards, a false charge was discovered in the accounts of the treasurer of a date prior to these transactions : *Held*, that the sureties on the first bond were responsible for it. *The County of Frontenac v. Breden*, 17 Grant, 645.

The mortgage was on property which the treasurer had previously mortgaged to the sureties for their indemnification : the mortgage to the sureties had not been registered, but had been left with the clerk of the council for safe keeping ; on receiving the new bond and mortgage, the clerk gave up to the treasurer the unregistered mortgage as well as the old bond, and the treasurer destroyed both : *Held*, that the old sureties were entitled to a first charge on the property for their indemnification in respect of the newly discovered defalcation. *Ib.*

A surety to a municipal corporation for the due performance of the treasurer's duties is not relieved from his responsibility by the negligence of the auditors in passing the treasurer's accounts. *Ib.*

The fact of the treasurer having become reduced in his circumstances after the auditing and passing of his accounts and before the discovery of an error in them, is no bar to a suit against the surety. *Ib.*

Where a corporation having a debt to pay, which it is their advantage to discharge immediately, raised money upon an accommodation note of an individual and applied the money to the payment of the debt, promising to protect the note or to repay, relief was given in this Court against the corporation upon a breach of the promise. And if the corporation could have been compelled to pay the debt the person so giving his note would be entitled to stand in the place of the corporation creditor. *Burnham v. Peterboro'*, 8 Grant, 366.

County Treasurer and his surety.

A bill for an account was held to lie at the suit of a municipal corporation against their treasurer and his sureties. *Ib.*

PRIORITIES.

See MORTGAGE, IV.

G recovered a judgment against *D*, and afterwards, though in insolvent circumstances, assigned the same by two assignments to his attorney, one for costs due him by *G*, and the other for a debt due to *R* by *G*. Afterwards *C* obtained a judgment against *G* and attached the debt so due to him by *D*, and gave notice of the attachment to *D* before the assignee of *G* had given notice of his assignments. *D* paid the moneys due to *G* by himself to the Sheriff under an execution issued at the instance of the assignee of *G*. *Held*, (1st) that the mere fact of *C* having been the first to give notice could not entitle him to priority over the assignee of *G*, but that, by reason of the insolvency of *G*, the assignments were void under statute 22 Vic., chap. 96, sec. 9. (2nd) That the solicitor of *G* must be restricted to the costs incurred by him in the action brought by *G* against *D*, and that *R* must stand as an ordinary creditor. *Davidson v. Douglas*, 15 Grant, 347.

The mortgagor of the lands in question having made an assignment in insolvency, subsequent, however, to the execution of the plaintiff, and it appearing that there was a surplus after payment of all claims proved against the lands in the suit by the prior mortgagee, it was *held* that, in the absence of proof of waiver by the plaintiff of his rights, the plaintiff was entitled to priority as against the creditors of the mortgagor under the assignment in insolvency. *Darling v. Wilson*, 16 Grant, 255.

Two mortgages were successively taken and registered which, by mistake, omitted a certain parcel of ground which both were meant to contain. The second mortgage was subsequently assigned for value, without actual notice of the first mortgage; and the assignee afterwards under a decree of this Court in a suit to which the joint mortgagees were not partners acquired the legal estate from the original vendor's grantee, who was entitled to hold it for unpaid purchase money: *Held*, that the assignee of the second mortgage was entitled as against the first mortgagee to hold the legal estate until the second

mortgage should be paid. *The Merchant's Bank v. Morrison*, 18 Grant, 382.

Reversed on appeal. 19 Grant, 1.

There were two mortgages on certain land. *O* having notice of the second mortgage, bought the first mortgage, and, at or about the same time, the equity of redemption, and gave to the party who was selling to him the first mortgage, a new mortgage for the sum *O* was to pay therefor. *O* conveyed portions of the land to his sons in terms subject to the mortgage which he had so given; and he afterwards paid that mortgage off: *Held*, [affirming the decree of the Court below,] that these facts were not sufficient evidence of an intention to merge under the statute 22 Victoria, chapter 87, and that the second mortgage had not acquired priority over the mortgage purchased by *O*. *Barker v. Eccles*, 18 Grant, 440.

PRIVILEGED COMMUNICATIONS.

See PRODUCTION OF DOCUMENTS.

PRO CONFESSO.

See ANSWER, 2—SERVICE, 6.

Noting pro confesso, effect of.

A bill was filed impeaching a patent as having been obtained wrongfully; the defendants were the patentee and his vendee, who had not paid all his purchase money. The patentee answered denying the equity claimed; his vendee allowed the bill to be noted *pro confesso*: *Held*, that the plaintiff failing to establish his case against the patentee, the bill should be dismissed against both defendants. *McDermott v. McDermott*, 2 Cham. R., 38.

To obtain an order to vacate an order *pro con.* and decree, a very clear case must be made. *Bank of Montreal v. Wallace*, 2 Cham. R., 17.

After a lengthy period had elapsed since the day appointed for payment in a *pro confesso* case, it was held necessary to give notice of the motion to take *pro con.* *Kirchoffer v. Stafford*, 2 Cham. R., 52.

Held, in a *pro confesso* case, that the report of the Master must be filed before the day appointed for payment. *Mills v. Dixon*, 2 Cham. R., 53 ; see also *Richardson v. Beaupre*, 54 ; and *Marshall v. Balfour*, 69, in same volume.

A note *pro con.* was set aside where the affidavit of service of office-copy bill was shown to be imperfect and insufficient. *Gordon v. Johnson*, 2 Cham. R., 210.

It is irregular to take an order *pro con.* where *pro con.* note stands in the Registrar's books unvacated. Strict service of an office-copy of the bill duly stamped will be required before an order *pro con.* can regularly issue. *Cameron v. Upper Canada Mining Co.*, 2 Cham. R., 215.

An order will not be made to take a bill *pro con.* against a married woman without her having had an opportunity to answer separately. *White v. Church*, 2 Cham. R., 203.

Where defendants made a proposal for settlement before answer, and there was no promise or proposal to extend the time for answering during the pendency of the negotiation : *Held*, that there was no irregularity in the plaintiff's noting the bill *pro con.* at the expiration of the time for answering.

Where defendant obtains an order for security for costs, it is not necessary to file affidavits shewing that the order has been complied with before the bill is noted *pro con.* *Bolster v. Cochrane*, 2 Cham. R., 327.

It is the proper practice for the Deputy Registrar to note the bill *pro con.* when the bill has been served within the jurisdiction. *Proctor v. Dalton*, 2 Cham. R., 470.

A motion under Order 144 Consol. Orders, to have the bill taken *pro con.*, will not be taken *ex parte.* *Richards v. Richards*, 2 Cham. R., 283.

PRODUCTION OF DOCUMENTS.

Affidavits on. See AFFIDAVITS.

A plaintiff is not bound by the defendant's view of the relevancy or otherwise of papers he seeks to have produced, and, though defendant swears positively that the papers have no bearing upon the case made by the bill, the Court will order their production. *Saunders v. Furnival*, 2 Cham. R., 49.

A party parting with papers, after service upon him of an order to produce, was ordered to produce them, to file a better affidavit, and to pay costs. *Ross v. Robertson*, 2 Cham. R., 66.

Letters passing between agents of a party to the cause, although written as though between themselves in confidence, are not privileged communications, or protected from discovery. Such letters are considered in the custody or power of the party in whose interest they are written, and must be produced. Such party cannot withhold part of their contents by cutting out portions of the letters. *Wiman v. Bradstreet*, 2 Cham. R., 77.

In a case between vendor and purchaser, where a defendant was called in to produce a certain letter, which he refused to produce, on the grounds "that the same is and contains an opinion from Mr. M Grath, who was then acting as my counsel and solicitor in the matter of the purchase of the lands and premises, upon my title to the said lands and premises, and because the same is a communication between myself and my solicitor, relating to my said title": it was *held* to be a privileged communication, and a motion to commit for non-compliance with a notice to produce, was refused with costs. *Wilson v. Brunskill*, 2 Cham. R, 147.

Where a party admits documents in his possession, he is *prima facie* bound to produce them, or assign a sufficient reason why he should not. But where a party refers in his bill to documents which otherwise he would not be liable to produce, he does not by so doing create a liability to produce them. *Green v. Amey*, 2 Cham. R., 138.

Where books were in actual use by defendant, the Court refused to order him to make verified copies of entries relative to matters in question for use of plaintiff; but when it was sworn on the part of the plaintiff, and not denied by defendant, that the latter had documents so relating which were not mentioned in his affidavit, he was ordered to produce them. *McDonell v. McKay*, 2 Cham. R., 141.

Where a bank agent refused to produce, on the ground that he had no documents in his possession, but as such bank agent, it was held that he ought to set out in his affidavit what documents were so in his possession; and it appearing from his answer, that he had taken a conveyance to himself as trustee for the bank, and that he had certain documents not mentioned in his affidavit, he was ordered to produce them, although the bank was not a party to the cause. *Ib.*

An order to produce cannot regularly be taken out after decree; and an order so taken out on *præcipe*, was set aside with costs. *Cottle v. Vansittart*, 2 Cham. R., 396.

A party called on to produce documents must state distinctly in his affidavit on production, what are the documents he seeks to protect, and the grounds on which he claims them to be privileged. *Wright v. The Western Insurance Company*, 2 Cham. R., 403.

Where documents are in the custody of the Deputy-Registrar in another cause, and are required at the hearing, an order for their production will be granted *ex parte*. *Gainer v. Doyle*, 2 Cham. R., 279.

The Deputy-Registrar will be ordered to attend at trial with the papers in his custody. But to obtain such an order, it should be shown that the papers required are the original documents, and that the production of office-copies will not be sufficient. *Chadwick v. Thompson*, 2 Cham. R., 389. See also *Jay v. McDonell*, 2 Cham. R., 71.

A party is not obliged to produce deeds or documents which relate to his own title and do not tend to establish the case of

the party calling for the production. *Stovel v. Coles*, 4 Cham. R., 9.

PUBLIC COMPANY.

See RAILWAY COMPANY.

The Act respecting railways declared a shareholder liable to judgment creditors of the company for "an amount equal to the amount unpaid on the stock held by him": *Held*, (reversing a decree of the late V.-C. Esten) that a shareholder in an action against him by a creditor of the company could not set off, in equity, a debt due to him by the company before the judgment was recorded. [VANKOUGHNET, C., and SPRAGGE and MOWAT, V.-CC., dissenting.] *McBeth v. Smart*, 14 Grant., 298.

PURCHASE AND PURCHASER.

See MORTGAGE II. 4, IV. 1—QUIETING TITLES—VENDOR AND PURCHASER.

1. *Compensation—Delay.*
2. *Costs—Vesting order.*
3. *Purchase under mistake.*
4. *Purchase by agent—Parol evidence.*
5. *Purchase for two by and in name of one.*
6. *Registered Title.*
7. *Purchase for value without notice.* See also FRAUDULENT CONVEYANCE.
8. *Fraudulent purchase at Sheriff's sale.*
9. *Purchase by a Municipal Corporation.*

1. *Compensation—Delay.*

Where on a reference granted at the instance of a purchaser under a decree, the Master had found him entitled to a less sum by way of compensation for delay, &c., than the evidence appeared at a subsequent stage of the proceedings to have warranted, and he applied for further relief after an interval of

eleven months, the Court refused the application on the ground of delay. *Dudley v. Berczy*, 3 Cham. R., 81.

2. *Vesting order—Costs.*

Where in a suit by creditors to set aside a settlement, lands were ordered to be sold, and the proceeds paid into Court; a purchaser after confirmation of sale paid his money into Court, and had his conveyance prepared and tendered for execution to the trustees, who were absent from the jurisdiction, and who refused to execute it; a vesting order was granted, and the costs of the motion were ordered to be paid out of the fund in Court. *Lawrason v. Buckley*, 3 Cham. R., 279.

3. *Purchase under mistake.*

The rule that a party in good faith making improvements on property which he has purchased, will not be disturbed in his possession, even if the title prove bad, without payment for his improvements, will be enforced actively in this Court, as well where the purchaser is plaintiff as where he is defendant; and that although no action has been brought to dispossess him. *Gummerson v. Banting*, 18 Grant, 516.

4. *Purchase by agent—Parol evidence.*

The plaintiff agreed with *J* to purchase a mining lease for their joint benefit, the consideration for which was to be the testing of the ore at the crushing mill of the plaintiff and at his expense. In pursuance of this arrangement *J* did arrange for the lease, but took the agreement therefor in his own name. The ore was, as agreed upon, tested at the crushing mill of the plaintiff, and at his expense, but *J* attempted to exclude the plaintiff from any participation in the lease, asserting that he had obtained the same for his own benefit solely: *Held*, that the true agreement could be shewn by parol; and that the plaintiff was entitled to the benefit of the agreement. *Williams v. Jenkins*, 18 Grant, 536.

5. *Purchase for two by and in the name of one.*

Where a purchase is made by one in his own name, but on

the joint behalf of himself and another, the decree for payment of the purchase money may be against both. *Sanderson v. Burdett*, 16 Grant, 119. In Appeal, 18 Grant, 417.

6. *Registered title.*

In a case of a registered title, a purchaser is in this country entitled to require the registration by his vendor of all the instruments through which the title is derived. *Brady v. Walls*, 17 Grant, 699.

7. *Purchase for value without notice.*

Land was sold for \$400, and the purchasers bound themselves that, in case of gold being found on the land in paying quantities, a joint stock company should be formed and incorporated for working the same; and that the grantor should in that case, in addition to the \$400, have \$600 in paid up shares of the capital of the company. No company was formed; and it was held, that this contingent agreement did not prevent the grantees from defending themselves, to the extent of their interest, as purchasers for value without notice. *Sanderson v. Burdett*, 16 Grant, 119.

Where a purchase was completed, conveyance executed, and purchase money paid without notice of an outstanding equity, but a bill claiming it was afterwards filed and *lis pendens* registered, before the registration of the purchasers' deed: Held, that they did not thereby lose their defence as purchasers for value without notice.—*Ib.*

In case of a purchase of a mortgage security recently given on all his real estate by an insolvent father to his son, the purchaser, if he has notice of the insolvency, should, before completing his purchase, satisfy himself by proper inquiries, that the mortgage was *bona fide*, and good against creditors. *Totten v. Douglas*, 16 Grant, 243. [But see S. C. In Appeal, 18 Grant, 341, where it was held that the purchaser was entitled to claim for the full amount of his claim in priority to subsequent execution creditors of the mortgagor. *Mowat, V.-C.*, dissenting.]

A mining lease for 99 years contained provisions enabling the lessor to demand, at his option, a royalty upon the proceeds of the mines, or \$4,000 in lieu of such royalty; the lessor had not exercised such option: *Held*, that the lessee was a purchaser for value, and that a prior voluntary conveyance was void as against him. *Conlin v. Elmer*, 16 Grant, 541.

The owner of an equitable interest in lands under a contract of purchase made a conveyance thereof to the plaintiff, his brother-in-law, and subsequently while still in possession of the land assigned the same property to third parties, in consideration of their giving him a lease of the premises, which was subsequently executed in the presence of, and witnessed by, the plaintiff after the deeds were completed. The plaintiff some time afterwards filed a bill impeaching the assignment and lease as fraudulent. The evidence tended to shew that the conveyance to the plaintiff was colourable only; and there not being any evidence of notice of the claim of the plaintiff, the Court dismissed the bill with costs.

Semble, the defence of purchase for value without notice is available to a party, although the interest conveyed is an equitable one only. *Davison v. Wells*, 15 Grant, 89.

Where a party claims under a quit claim deed he is, in general, not protected as a purchaser for value without notice.—*Goff v. Lister*, 14 Grant, 451.

8. *Fraudulent purchase at Sheriff's sale.*

A creditor obtained judgment against his debtor's executors, and issued thereon execution against the lands of the deceased, which had been devised to a minor. The creditor interfered to prevent competition at the sale, and then bought the property at one-half its value: *Held*, that his purchase was not maintainable in equity. In re *Thomas Davis*, 17 Grant, 603.

QUALIFIED ALLEGATIONS.

On demurrer *ore tenus*: *Held*, that every material allegation in a bill must be positive. *Yarrington v. Lyon*, 2 Cham. R., 22.

QUIETING TITLES.

DECISIONS UNDER THE ACT FOR QUIETING TITLES RELATING TO
THE FOLLOWING SUBJECTS.

1. *Evidence of lost Deed.*
2. *Certificate.*
 - (a) *Of Counsel.*
 - (b) *Of Sheriff.*
 - (c) *Of Treasurer.*
 - (d) *Of Registrar.*
3. *Suppression of material facts.*
4. *Where Petitioner not in possession.*
5. *Certificate granted on a false affidavit.*
6. *Trust Estates.*
7. *Application by Vendee under inchoate contract.*
8. *Where Evidence doubtful.*
9. *Notice, &c. (See below, Div. 17).*
10. *Sales under Execution.*
11. *Purchase for value without Notice.*
12. *Statute of Limitations.*
13. *Where erroneous certificate issued.*
14. *Tax Titles.*
15. *Discovery of new Evidence.*
16. *Practice under Act, and what necessary to be established.*
17. *Title by prescription—Possession—Notice.*
18. *Power of sale in settlement.*
19. *Affidavit of Petitioner.*
20. *Title passing through hands of Trustees.*
21. *Married woman—Security for Costs.*
22. *Re-investigating.*
23. *Possession—Disseisin, dower.*
24. *Miscellaneous.*
25. *Mutual Insurance Policies a charge.*
26. *Taxes.*
27. *Reporting by consent.*
28. *Estates Tail.*

1. *Evidence of lost Deed.*

In seeking to prove the existence and contents of a lost deed, the affidavit of the petitioner alone as to searches is not sufficient; the particulars as to searches, by whom made, where, and why there made, should, be given, and such a case generally as would before a Court be sufficient to let in secondary evidence.

A memorandum made in a book by a party through whom the petitioner claimed, was held not to be evidence in favour of petitioner. *Re Bell*, 3 Cham. R., 239.

In examining a title under the Act for quieting titles, a memorial executed by the Grantee is good secondary evidence, where the possession has been in accordance with the title so claimed.

The weight of authority appears to be also that such evidence is admissible in ordinary suits. *Re Higgins*, 4 Cham. R., 128.

2. *Certificate.*(a) *Of Counsel.*

The certificate of counsel in support of a petition under the Quieting Titles Act should follow the language of the 8th section of the Act, and state to the effect that he has investigated the title, &c. A certificate of counsel that he had corresponded with the agent of the petitioner on the subject of the various matters set forth in the petition, and believed them to be true, was *held* to be insufficient.

The schedule of particulars referred to in the petitioner's affidavit should be identified by the Commissioner in like manner as any other exhibit. *Re Dickson*, 3 Cham. R., 352.

(b) *Certificate of Sheriff.*

Where a Sheriff certified that he had not on a particular day any executions against the lands of a petitioner, it was *held* insufficient, and that he should have certified that he had not had any for the thirty days previous, and that the lands in

question had not been sold under execution for the preceding six months.

Where the petitioner's title was acquired within two years before the filing of the petition, the Sheriff's certificate was required as to executions against the prior owner, as any such executions, if duly renewed, might be binding upon the land. *Ex parte Lyons*, 2 Cham. R., 357.

It is necessary that a certificate from the Sheriff of no executions against the petitioner should be produced. *Re Rundle*, 4 Cham. R., 86.

(c) *Certificate of Treasurer.*

Where the County Treasurer certified that "there is no tax charged in his office against lot, &c.," held insufficient, and that it should be shown that the return of lands in arrear for taxes for the preceding year had or had not been made by the Township Treasurer; also, that the County Treasurer's certificate should show that the land had not been sold for taxes for eighteen months preceding its date. *Re Harding*, 3 Cham. R., 232.

(d) *Certificate of Registrar.*

The certificate to be produced from the County Registrar as to the state of the registered title, must show what memorials were registered up to the time of registering a certificate of the filing of the petition. *Ex parte Hill*, 2 Cham. R., 348.

3. *Suppression of material facts.*

An application for leave to pay into Court \$400, as security for costs of an appeal from a certificate of title under the Quiet-ing Titles Act, having been granted by the Referee *ex parte*, and it not having been brought to his notice that the appeal was as to two separate parcels of land, one claimed by a husband and wife, and the other by the husband alone; it was held that the order was bad, as these facts should have been made known to the Referee, and the order under such circumstances made upon notice. *Re Howland*, 4 Cham. R., 6.

4. *Where petitioner not in possession.*

The Court will not grant a certificate to quiet the title of a party who claims to be the legal owner in fee simple, but who is not in possession of the land claimed, and is kept out of such possession by a person who disputes the title of the claimant: in such a case the claimant must first recover possession of the premises. *Re Mulholland*, 18 Grant, 528.

5. *Certificate granted ex parte on a false affidavit.*

A certificate granted *ex parte* on a false affidavit was set aside with costs, notwithstanding the contention that the notices as to the service of which the false allegation was made would not have been directed had the full facts been before the Court; the Court declining to enter into any question of merits. *Re Ashford*, 3 Cham. R., 77.

6. *Trust Estates.*

Whether trust estates escheat, &c., considered. *Re Adams*, 4 Cham R., 29.

7. *Application by vendee under an inchoate contract.*

The first section of the Act for Quieting Titles, 29 Vic., ch. 25, does not apply to the case of a vendee who has contracted to purchase, but who has not completed his contract. Where, under such circumstances, the vendee filed a petition without first obtaining the consent of the vendor, the Court, in the exercise of its discretion under the 2nd section of the Act, refused to entertain the petition. *Re J. G. Brown*, 3 Cham. R., 158.

8. *Where evidence doubtful.*

On a petition to quiet the title to land, the genuineness of the documents on which the petitioner claimed title having been impeached, and the evidence being doubtful, the Court refused a certificate, without pronouncing absolutely upon the genuineness or spuriousness of the documents in question. *Graham v. Meneilly*, 16 Grant, 661.

9. *Notice, &c.*

The effect of a certificate under the Act is so stringent that great particularity must be exercised by the Court in seeing that all parties entitled to notice have been duly and regularly served, and that strict proof of such service be given.

The entry in a docket of a deceased solicitor stating service of a notice of application, was considered insufficient evidence of notice having been given to all the tenants entitled to notice. *Ex parte Palmer*, 2 Cham R., 351.

Where a title by possession is relied on by a petitioner under the Act, notice of his application must, under the direction of the Referee, be given to the persons who, but for such possession, would be the owners, unless it has been shown that due enquiry has been made for such persons without success.

It is necessary to show that the notices posted at the Court-House and nearest Post-Office were continued for the period directed by the Referee. When, a year after the testator's death, a petition for a certificate was filed on the part of his devisees, notice was required to be given to the heirs or some of them. *Ex parte Hill*, 2 Cham. R., 348.

10. Sales under execution.

Inadequacy of price, sufficient to set aside a conveyance as between private individuals, will not serve as a ground for setting aside a sale by a Sheriff under execution. The rule could only be applied in an extreme case.

A Sheriff, in obedience to a writ of *venditioni exponas*, in November, 1849, exposed for sale, by auction, and sold to the attorney of the plaintiff in the writ, for £70, a farm of 150 acres, variously estimated as worth £2 10s. and £5 per acre; but which was subject to three rights of dower, two of the parties being young women. In April, 1867, the party claiming under the purchaser at Sheriff's sale, filed a petition under the Act to quiet his title. The devisee of the execution debtor opposed the certificate on the grounds of improper conduct in the matter of the sale by the Sheriff, evidenced by the gross inadequacy of consideration. The Referee of titles reported in

favour of the claimant ; and, on appeal, both parties desiring an adjudication on the facts appearing in the affidavits and proceedings before the Referee, the Court affirmed the finding of the Referee, and dismissed the appeal with costs. *Laing v. Matthews*, 14 Grant, 36.

11. *Purchase for value without notice.*

In proceeding under this Act to quiet a title, if it appears that the opposing claim is such that had a bill been filed by the party entitled to enforce it, the applicant would have had a good defence as a *bona fide* purchaser for value, without notice, the applicant will be entitled to obtain the usual certificate of title. *Cochrane v. Johnston*, 14 Grant, 177.

12. *Statute of Limitations.*

The filing of a petition, under the Act for Quieting Titles, is not such a proceeding as will save the rights of a party contestant, otherwise barred by the Statute of Limitations. *Laing v. Avery*, 14 Grant, 33.

A petitioner claiming title by length of possession against the patentee of the Crown, failed to shew that the patentee or his heir had any knowledge of such possession. It was held that he must shew a forty years' possession, or such knowledge. *Re Linet*, 3 Cham. R., 230.

Where a Referee finds in favour of a title, acquired by adverse possession for twenty years, against the legal paper title, his certificate must shew of what portion of the lot the claimant has been in possession : as by the occupation of one or more acres of a wild lot of land, a party will not acquire title to the whole lot, but only to so much as he is in actual possession of. *Low v. Morrison*, 14 Grant, 192.

Where a party having acquired title to land by an adverse possession for twenty years, institutes proceedings under the Act to quiet his title, he must establish his right at his own expense : costs do not follow as a matter of course in proceedings under this Act ; and,

Semble, that although such adverse title is established, the applicant may be made to pay the costs of an unsuccessful contestant. *Low v. Morrison*, 14 Grant, 192.

13. *Where erroneous certificate issued.*

Where it was shewn that an erroneous certificate had been issued, but not registered, and no deed or incumbrance since made affecting the land, a motion on petition that a proper certificate issue was granted *ex parte*. *Bradley v. McDonell*, 2 Cham. R., 274.

14. *Tax sales.*

The County Treasurer is not at liberty to become a purchaser at a tax sale.

Under the Act for Quieting Titles, where a contestant sets up a tax sale which is found invalid, he is entitled to a lien for the taxes paid by his purchase money, with the proper percentage to which the owner would have been liable if no sale had taken place. Under the Act for Quieting Titles it is proper to give a further opportunity to a contestant to supply any deficiency in the proof of his title, as well as to give such opportunity to the petitioner. In re *Cameron*, 14 Grant, 612.

15. *Discovery of new evidence.*

In a case of considerable suspicion as to the title of a petitioner under the Act for Quieting Titles, the Court stayed the certificate on the ground of the discovery of new evidence, though witnesses had been twice examined *viva voce*, and nearly a year had elapsed since the second examination; the applicants satisfactorily accounting for their not having adduced the new evidence at an earlier date. *Brouse v. Stayner*, 16 Grant, 1.

16. *Practice under Act, and what necessary to be established.*

Under the Act for Quieting Titles, every material fact which is capable of being proved by independent evidence, ought to be proved; thus it is necessary to prove search for missing deeds: an affidavit by petitioner himself of search for such deeds is insufficient. *Ex parte Wright*, 2 Cham. R., 355.

Proof is indispensable either that possession has always accompanied the title under which petitioner claims, or that some sufficient reason exists for not adducing such proof. *Ib.*

Where the former owner, a person of the same name as the petitioner, had conveyed the land to the petitioner a few days before the filing of the petition, and the title appeared simple, the Court called for explanations, as it was necessary to take care that the Act was not being made use of for any improper purpose, such as defeating the creditors of the owner by getting the title of a voluntary grantee quieted before the creditors were aware of the attempt to defraud. *Ib.*

Where property is claimed by or on behalf of a wife under a conveyance made to her during coverture, an explanation of the transaction should be given on oath to shew that it was *bona fide*, and was such that the husband's creditors could have no claim on the property; the affidavits for this purpose should be by the petitioners, and should be satisfactorily corroborated by disinterested persons of known credibility. *Ex parte Lyons*, 2 Cham. R., 357.

Where the petitioner claimed the north-east part of a lot under a will devising the north-west part, and it was alleged that the word "north-west" was a clerical error in the will, all the parties interested in the opposite view were required to be served with a notice of the application signed by the Referee or Inspector, unless a case should be made for dispensing with service on some of them. *Ib.*

Where a petitioner claimed title under an alleged conveyance from a person whose right to an undivided half of the property in question had been established by evidence, but no certificate had yet issued, the Court required an affidavit shewing the facts, and that the Court was prepared to issue a certificate to such person, and that he had full knowledge of the facts, and consented or did not object to a certificate issuing to the petitioner before one was granted. *Re Dougherty*, 4 Cham. R., 96.

Title by prescription—Evidence of length of possession—Notice to person holding paper title—Deeds.

A petitioner claiming title by length of possession must prove possession for the requisite length of time by clear and positive evidence, which should be of more than one independent witness.

In such a case a notice prepared and signed by the Referee should be served upon the person having the paper title, if he can be found ; but if not, evidence should be put in both of search for him and his representative, and if such search prove fruitless, possession should be shown to have been long enough against him, even though he had no notice of such possession.

A mortgage more than twenty years old appeared upon the registrar's abstract. A discharge of this did not appear to have been registered, none was produced, nor was any proof given of the mortgage ever having been discharged. It was stated on affidavit that nothing was known of the mortgagee, and that no demand had ever been made for the mortgage debt, though nothing had been paid, and that no acknowledgment had been given within twenty years or more : *Held*, that evidence should be adduced of search for the mortgagees or their representatives. That a single *ex parte* affidavit that no payment or demand had taken place would not bar claims of mortgagees who could be served with notice. But if they could not be found notice might be dispensed with after a great length of time, and satisfaction presumed. *Re Caverhill*, 8 U. C. L. J. 50, 4 Cham. R.

17. *Evidence of possession and deeds—Notice to person in possession.*

To complete the chain of the paper title to the land to which a certificate of title was prayed, production or proof of a power of attorney from the patentee to one Johnston was required. Search had been made for it without success. Its existence was not sworn to positively by the petitioners, and the only evidence of it was an affidavit of one Page, who did not swear that he had ever seen it, and did not state his means of knowledge of its existence.

There were also some suspicious circumstances with regard to a deed executed apparently in pursuance of the power.

The only evidence as to possession was a statement in the petitioner's affidavit that one Hicks, to whom the petitioners agreed to sell the land in 1866, was still in possession, and that possession had always accompanied the title. No notice appeared to have been given to the person who was in possession. No affidavit was put in as to adverse claims served upon the person directed to receive them.

The evidence as to possession and the existence of the power of attorney was held insufficient, and a certificate of title was refused until further evidence should be given to clear up the suspicious circumstances of the deed said to be executed in pursuance of the power of attorney, and affording positive proof of the existence of the power, or else shewing the exercise of acts of ownership, which would justify the presumption that a conveyance of the legal estate had been made by the patentee.

Notice was directed to be given to the person in possession, and an affidavit as to the adverse claims ordered to be furnished.

N.S.

Re *Street*, 8 U. C. L. J. 193, 4 Cham. R., 99.

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18. *Power of sale in settlement.*

Trustees were empowered by settlement "to lay out and invest the whole or part or parts of the residue and remainder of the fortune of the said Georgina Huson (the settlor) so limited in trust as aforesaid in the purchase or purchases of land in fee (free from incumbrances) or such other good security as they shall think fit in England or elsewhere," and a power of sale was given to resell lands so purchased: *Held*, to give a sufficient power of sale to the trustees to sell lands of residue of the estate generally. In re *Evans*, 4 Cham. R., 102.

19. *Affidavit of Petitioner.*

In proceeding under the Quieting Titles Act, although it is not imperative that the affidavit in proof of title should be made by the petitioner, some valid reason should be given why

it is not so made when such is the case. *Re Rundle*, 4 Cham. R., 86.

20. *Title passing through hands of Trustees.*

Where the title had passed through the hands of a trustee to pay creditors, an advertisement was directed to be published, calling on such creditors to shew cause why a certificate should not issue. *Re Rundle*, 4 Cham. R., 86.

21. *Married woman—Security for costs.*

A married woman applying under this Act must proceed by next friend.

Where parties who had been contestants, and the Referee having found against them, appealed, and the appeal was dismissed with costs, afterwards applied to have a re-investigation of the title, on an application by the original petitioner, proceedings were stayed until the costs of the appeal were paid, and security given for costs of the present proceedings, and until a next friend was appointed for the married woman contestant, and this decision was upheld on appeal. *Re Howland*, 4 Cham. R., 90.

Memorial—Married woman—Conveyance—Possession.

A conveyance executed by a married woman and her husband in the year 1825 was lost : *Held*, that the registration of the memorial was no evidence of the wife having been examined, or a certificate of the examination having been indorsed on the deed. Long possession in connection with other circumstances may entitle a court or jury to presume the due examination and certificate, without express evidence of such examination and certificate. *Re Higgins*, 4 Cham. R., 128.

22. *Reinvestigating.*

The Court will, in the interests of justice, exercise a liberal discretion in extending the time for appealing, or reinvestigating a title, where any error is alleged to exist, and under the circumstances it appearing that the contestants had been somewhat misled as to a separate piece of land to which they sup-

posed no claim to be asserted, the Court granted an application for a reinvestigation of the title, after the time for appealing had expired, on payment of costs. *Re Howland*, 4 Cham. R., 90.

23. *Possession—Disseisin—Married Woman—Dower.*

Property owned by a married woman was in possession of her and her husband. *W*, their second son, lived with them; the wife died, leaving her husband and *W* in possession; the husband afterwards left the premises, but *W* continued to reside there. After the death of their father, *J*, the eldest son of the original owner, conveyed, in 1832 to *W*, who was still in possession. *J*'s wife did not join in the conveyance: *Held*, that there had been under these circumstances no disseisin, and *J*, having conveyed before the passing of the Real Property Act, his widow was entitled to dower out of the property. *Re Higgins*, 4 Cham. R., 128.

Where the petitioner seeks to establish title by possession, the possession under which a title is claimed must be uninterrupted possession, and one of the land, and should be in accordance with the title set up.

Proceedings under the Quieting Titles Act will not be made a substitute for an action of ejectment, and a petitioner must therefore have substantially an estate in possession. *Re Bell*, 3 Cham. R., 239.

24. *Miscellaneous decisions.*

Where the question involved, on an application for a certificate of title, was the legal title to the property, and the proper determination of the question depended on the credibility of witnesses against, or in favour of, certain old documents which were impeached as forgeries, the Court directed an action of ejectment to be brought, in order that the question might be tried by a jury of the county where the principal witnesses resided. *Ib.*

Where a petitioner in proceeding under the Act, makes out his title satisfactorily, he is entitled to a certificate unless the

title can be successfully impeached at law or in equity ; and if a bill filed by the contestants impeaching the transaction, by which the claimant's title arose, could be successfully resisted by the claimant on any ground, it will form no obstacle to a certificate being granted to the claimant. *Laing v. Matthews*, 14 Grant, 36.

An appeal from a decision of the Referee under the Act for Quieting Titles may be to a single Judge. *Amour v. Smith*, 16 Grant, 380.

A contestant who is in possession of the property claimed should be permitted to point out defects in the claimant's *prima facie* title, before being called upon to prove his own title to the property.

In 1866, *J G B* filed a petition for a certificate of Title to a wild lot under a conveyance executed to him in 1860 by *P*, the patentee. This claim was contested by *S*, who claimed, through divers mesne conveyances, under a deed executed in 1835, in *P*'s name by an attorney. The good faith of the various grantees, through whom the contestant claimed, was not disputed ; but the question of title turned on the genuineness of the power of attorney, and of a bond which purported to authorize the execution of the deed of 1835. The impeached instrument bore date in 1833, and *P* had done no act in respect of the land from that time until the petitioner induced him in 1860, for a small consideration, to execute the conveyance of that date. The evidence as to the instruments was conflicting, but the Court being satisfied on the whole that the impeached instruments were forgeries by the petitioner's father : *Held*, that the petitioner was entitled to his certificate. *Brouse v. Stayner*, 16 Grant, 553.

25. *Mutual Insurance Policies a charge.*

The liabilities of parties insured in Mutual Insurance Companies is a charge on the property insured ; and an affidavit is necessary stating that there is no such policy in existence, or that the policies named are the only ones in existence.

26. *Taxes.*

The Court has no jurisdiction to grant a certificate unless all taxes except those for the current year have been paid. *Ex parte Chamberlain*, 2 Cham. R., 352.

27. *Reporting by consent.*

Where a petition was filed under the Act, and a person holding a sheriff's deed put in an adverse claim, it was *held*, that the Referee could by consent report thereon before he was ready to decide on the petitioner's title, but should not do so without consent; that the petitioner must make out his title; and that until he has done so he cannot generally demand an adjudication on an adverse claim. In *re Cameron*, 14 Grant, 612.

28. *Estates Tail.*

Whether a mortgage in the short form, under the statute 27 and 28 Vic., ch. 31, executed by the tenant in tail, has the effect of barring the entail.—*Quere.* *Re Dolsen*, 4 Cham. R., 36.

RAILWAY AND RAILWAY COMPANY

The Statute 19 Vic., ch. 21, incorporating the Buffalo and Lake Huron Railway Company, with power to purchase the railway therein mentioned, did not deprive unpaid owners of any lien they had for the price of land theretofore sold to the old company. *Paterson v Buffalo and Lake Huron Railway Co.*, 17 Grant, 521.

The old company was held to be a necessary party to a suit by a land-owner to enforce a lien for purchase money in respect of land sold to the old company before the transfer of the railway to the new company; it not appearing that the old company was interested in the question to be litigated.—*Ib.*

An agreement, not under seal, for the sale of land to a railway company, for the purposes of the railway, no price being agreed on, in pursuance of which agreement the railway company

was allowed to take, and did take, possession—is enforceable in equity.—*Ib.*

A bill alleged that the defendants *A* had taken from their co-defendants *B* their “line of railway for a certain number of years yet unexpired, and under the said agreement the defendants *A* claim to hold, run, and operate, as they are now doing, the said line of railway.” A demurrer on the ground that these statements did not state sufficiently the title of the defendants *A*, was overruled.—*Ib.*

A Statute gave the bondholders of the Cobourg and Peterborough Railway Company an option to convert their bonds into stock, and enacted that this “converted bonded stock” and any new subscribed stock should be preferential to the ordinary stock, and they should be entitled to dividends at 8 per cent. per annum, in priority to any dividend to the ordinary shareholders. By a subsequent Act the Company was authorized to unite with another Company, and it was declared that the two Companies and those who should become shareholders in the new company under the Acts relating to the Cobourg and Peterborough Railway Company, and under the deed of union, should constitute the new company : *Held*, that the union did not extinguish the right of the bondholders to elect.

The Act authorizing the union of two incorporated companies declared, that any deed the companies executed under the Act should be valid to “all intents and purposes, in the same manner as if incorporated in the Act.” *Held*, that this provision enabled the companies to bargain together in respect of the rights which each had, and to make such arrangement as their union rendered necessary ; but did not give them legislative authority over the rights of other persons.

A Statute authorized two companies to unite into one company, by either a complete or a partial union ; and either of joint or separate, or absolute or limited liabilities to third parties. The companies agreed to an absolute union, and made no provisions for limiting the liability of the new company in respect of past transactions of the old companies : *Held*, that the

new company thereby assumed all the liabilities of the old company to third persons. *Cayley v. The Cobourg and Peterborough and Marmora Railway and Mining Company*, 14 Grant, 571.

A railway company having become insolvent, an Act was passed estimating the claims of creditors for land taken by the company at \$30,000, and the value of the whole railway property at \$100,000, and directed that \$30,000 should be applied on debts for land and the balance of the \$100,000 divided *pro rata* among the other creditors; the \$30,000 proved more than sufficient to pay the land debts in full, and the company claimed to be entitled to the balance; but *held* that the other creditors were entitled to it. *In re Cobourg and Peterborough Railway Co.*, 16 Grant, 571.

RATES.

The limit of two cents in the dollar demanded by the Municipal Act of 1866, as the maximum of assessment, includes the special sinking fund rate to be levied in respect of past debts. *Wilkie v. The Corporation of Clinton*, 18 Grant, 557.

RECEIVER.

Where a receiver had made an investment unauthorised by the Court, by which a profit had been made, the amount realized was directed to be added to the principal. *Baldwin v. Crawford*, 2 Cham. R., 9.

The recognizances of a receiver will not be deemed sufficient security under the Statute. *Re Ward*, 2 Cham. R., 188.

Although the appointment of a receiver by the proper officer of the Court should not be lightly disturbed, still in a case where it appeared that there was personal ill-feeling between the person appointed by the Master and some of those interested, and that a person who had been proposed by other parties to the cause was, owing to his business habits, likely to be better qualified to discharge the duties of receiver, and was

entirely unexceptionable, the Court vacated the appointment made by the Master, and ordered the other to be appointed. *Brant v. Willoughby*, 17 Grant, 627.

RECOGNIZANCE IN CRIMINAL CASES.

A recognizance which was expressed to be the joint and several recognizance of the prisoner and his sureties was acknowledged by the sureties only ; and the prisoner was discharged without his acknowledgment first having been obtained : *Held*, that the sureties were liable. [SPRAGGE, C., MOWAT and STRONG, V.CC., dissenting.] *Rastall v. The Attorney-General*, In Appeal, 18 Grant, 138.

RECTOR AND RECTORY LANDS.

See MORTGAGE, VII.

A lease of rectory land by the rector contained a covenant not to clear more than a certain portion of the land demised ; that the clearing should be for agricultural purposes, in contiguous fields, not exceeding ten acres each, such fields to be enclosed in good lawful fences, " and shall be sufficiently chopped, underbrushed, logged, and burned, according to the due course of farming and good husbandry." It appeared that the lessee's cutting was not meant to be limited to what " might be necessary in working regular clearings on the land," and the lessee, with the lessor's consent, cut and sold the timber off 180 acres ; but the lessee having for two years done nothing towards clearing this portion of the demised land, it was *held* that the delay was open to the objection of being contrary to " the due course of farming and good husbandry," and that the lessee was liable to damages in respect thereof. *Lundy v. Tench*, 16 Grant, 597.

By letters patent, dated in January, 1824, certain lands were granted to three parties, upon the trust, amongst others, to convey the same to the incumbent, whenever the Govern-

ment should erect a parsonage or rectory in Kingston, and duly appoint an incumbent thereto, such conveyance to be upon trusts similar to those thereinbefore expressed. In January, 1836, a rectory was created in Kingston. In May, 1837, the trusts for which the patent of 1824 had been issued, having been carried out, and one of the trustees named therein appointed rector, the other two joined in a conveyance to him as such rector, to hold to him and his successors, subject to the uses and trusts set forth in the grant to them. In 1842 this incumbent created a lease for twenty-one years (under which the plaintiffs claimed), whereby he covenanted for himself and his successors to pay for certain improvements made by the lessees of the premises, or that he or they would execute a renewal lease on terms to be agreed upon, and that until such payment for improvements or renewal of lease, the lessees should retain possession of the premises : *Held*, that the incumbent, either as a trustee or rector, had no power to bind his successors to pay for improvements, or to enter into any agreement which *a priori* would extend the lease beyond the twenty-one years. *Kirkpatrick v. Lyster*, 16 Grant, 17.

REDEMPTION AND REDEMPTION SUIT.

See MORTGAGE, III.

Equity of, Where Severed. See JUDGMENT, &c., 7.

In a suit to redeem the plaintiff alleged several grounds for relief which he failed to establish, although he succeeded in showing a right to redeem, which right the defendant had contested ; the Court, under the circumstances, refused costs to either party up to the hearing, and gave the defendant the subsequent costs of a redemption suit where the right to redeem is admitted. *Boswell v. Grasley*, 16 Grant, 523.

The equity of redemption in mortgaged lands was offered for sale under execution at law, and the mortgagee bid off the property at \$200 ; but the sale proved to be inoperative : *Held*,

that the mortgagee could not add the amount so paid to the amount of his mortgage debt. *Paul v. Ferguson*, 14 Grant, 230.

Where there were several defendants interested in the equity of redemption of certain property, and one purchased up several outstanding shares of co-devisees also interested, and so dealt and acted that the other parties interested assumed that he intended to redeem for their mutual benefit, instead of which he arranged with the mortgagee to suffer foreclosure and then bought from him, it was *held*, that he could properly do so for his own sole benefit. *Ruttan v. Levisconte*, 2 Cham. R., 108 ; see also *Ardagh v. Wilson*, 2 Cham. R., 70.

REFEREE.

See APPEAL.

His jurisdiction as to costs, &c. Re Lot B, 8th Con., Enniskillen, 2 Cham. R., 22.

His jurisdiction, duties, &c. See ACT 34 Vict., c. 10.

Appeals from—Amending decree, &c.

On an appeal from the Referee the case will be confined strictly to that made on the original motion, and only such pleadings or other documents as were then read will be allowed to be used.

The Court will inform itself of what these were, and take notice of its own records and proceedings when it becomes necessary.

When a question arose as to what pleadings had been read on a motion, the Court sent for the Referee's notes, and was guided by them. *Perrin v. Perrin*, 3 Cham. R., 452.

The Referee's jurisdiction with regard to amending decrees considered. *Lapp v. Lapp*, 3 Cham. R., 234, affirmed. *Lapp v. Lapp*, 4 Cham. R., 3.

REFERENCE.

Under decree.

In an administration suit, after delay on the part of the plaintiff, the conduct of the reference was given to a solicitor representing certain creditors of the estate. The plaintiff's solicitor, with the consent of the defendant's solicitor, but without notice to the solicitor of the creditors, or informing the Court that such solicitor had the conduct of the reference, applied in Chambers, and obtained an order to change the venue from Goderich to Stratford. Such order was on application set aside with costs. *McConnell v. McConnell*, 3 Cham. R., 122.

To Arbitration.

By infants. *Allan v. O'Neil*, 2 Cham. R., 22.

Changing. *McNab v. McInnis*, 4 Cham. R.

REGISTRATION.

See PURCHASER.

I. NOTICE.

II. REGISTERED JUDGMENTS.

I. NOTICE.

Registry Act of 1865.

The Registry Act of 1865 (section 66) does not avoid an equity against a subsequent instrument which is registered, but was taken with notice of the adverse claim. *Forrester v. Campbell*, 17 Grant, 379.

The principle upon which the Registry Act proceeds is, that a party acquiring land ought to see whether there is anything registered against the land he is about to acquire, and that he is assumed to search the registry for that purpose; but this does not apply to one who is not acquiring, but parting with an interest in land. *The Trust and Loan Company v. Shaw*, 16 Grant, 446.

Where the registered owner of land had parted with his interest therein by an unregistered deed, a person who afterwards fraudulently took and registered a conveyance from such regis-

tered owner, prior to the Registry Act of 1865, knowing or believing that his grantor had parted with his interest, was held not entitled to maintain his priority over the true owner, though he did not know, or had no correct information, who the true owner was. *McLennan v. McDonald*, 18 Grant, 502.

A registrar of deeds gave to an intending purchaser an abstract of title, which by mistake omitted an outstanding mortgage: *Held*, that a purchaser who had notice of the omitted mortgage could not make any claim against the registrar in respect of payments made by the purchaser after such notice; and the registrar who on finding his mistake had bought up the outstanding mortgage, was held entitled to foreclose the same. *Brega v. Dickey*, 16 Grant, 494.

Express notice of an unregistered assignment of unpatented land has the same effect as like notice of an unregistered conveyance after patent. *Goff v. Lister*, 14 Grant, 451.

The 66th section of the Registry Act (1865), which enacts that "no equitable lien, charge or interest affecting land shall be deemed valid in any Court in this Province after this Act shall come into operation, as against a registered instrument executed by the same party, his heirs or assigns; and tacking shall not be allowed in any case to prevail against the provisions of this Act,"—is not retrospective. *Rachel McDonald v. Archibald McDonald*, 14 Grant, 133.

Constructive Notice.

In case of an unregistered interest of a date antecedent to the Registry Act of 1865, and not founded upon a deed or conveyance which was capable of registration, constructive notice is sufficient notice against a subsequent registered conveyance; and possession of the property by the party having such unregistered interest is sufficient constructive notice for this purpose. The Court of Chancery in this country having frequently held, constructive notice of an unregistered interest to be insufficient where such unregistered interest was founded on an instrument capable of registration, and the want of actual notice was not wilful or fraudulent; this rule will be continued to be acted on

until the different doctrine lately held by V.-C. Stuart in England, and Mr. Justice Lynch in Ireland, is adopted in appeal either in England or here. *Moore v. The Bank of British North America*, 15 Grant, 308.

The registration of a deed is not constructive notice of the grantor's interest in land not comprised in it ; and has not the same effect in that respect as actual notice of the registered deed might have. *The Merchants' Bank v. Morrison*, 18 Grant, 382.

II. REGISTERED JUDGMENTS.

A bill was filed to enforce a registered judgment while the law for the registration of judgments was in force. After the registration of the judgment the debtor executed a mortgage on his land, and then assigned his estate for the benefit of his creditors. The bill was against the debtor only, and the mortgagees and assignees for creditors were not made defendants until after decree, nor until after the time limited for bringing suits by the Act abolishing registration of judgments : *Held*, that the registration of the judgment did not affect the mortgagee or the creditors entitled under the deed of trust ; and that the mortgagee was entitled to priority over the plaintiff.

Land was conveyed in trust to pay (first) mortgages, and (secondly) registered judgment. A creditor whose judgment was registered before the date of a mortgage given by the debtor to another creditor assented to the deed, and his assignee afterwards filed a bill, stating such assignment and praying for the administration of the estate : *Held*, that the judgment creditor had submitted to be paid according to the order provided by the deed. *McDonald v. Wright*, 14 Grant, 284.

Sheriff's deed.

Where a judgment was registered and a *fi. fa.* against lands was delivered to the Sheriff before the expiration of three years, but the sale did not take place until after the three years had elapsed, and the judgment had not been re-registered, *held*, that the Sheriff could only sell any land the debtor had at the time,

the *fi. fa.* was placed in his hands ; and that a conveyance made by the debtor before the judgment was obtained, but not registered till after the registration of the judgment, took precedence of the Sheriff's deed. *Chesley v. Coupe*, 15 Grant, 214.

REHEARING.

Leave to rehear was given when the time for rehearing expired a few days before rehearing term, and the delay had not really affected the progress of the cause, there having been no sittings to rehear causes in the interval. *Stevenson v. Nicholl*, 2 Cham. R., 183.

A motion for leave to rehear the cause after the time limited for rehearing has expired may be made *ex parte*. *Dickson v. Burnham*, 2 Cham. R., 436.

A vacancy occurring on the Bench was deemed a sufficient reason for not rehearing at the first rehearing term after the decree drawn up ; and the time was on application extended. *Romanes v. Fraser*, 3 Cham. R., 53.

A motion for leave to rehear notwithstanding more than six months would have elapsed from the date of the decree before the then next hearing term was granted, where it appeared that judgment had been given but a short time previous to the last rehearing term. *Fleming v. Duncan*, 3 Cham. R., 53.

Where it was shown that a decree not enrolled, which had been pronounced in 1855, was clearly erroneous, an order was made for rehearing the cause notwithstanding the lapse of time. *Cameron v. Wolf Island Canal Company*, 3 Cham. R., 54.

A notice to rehear a cause, by the party who has the carriage of the decree, does not, in the absence of special circumstances, entitle him to stop the prosecution of the decree in the Master's office. *Stephenson v. Nicolls*, 14 Grant, 144.

Where a party to a cause is dissatisfied with the manner in which the Registrar takes the account between the parties and desires to have the decree drawn up by the officer on *præcipe*,

varied, it is not necessary to rehear the cause ; the proper mode is to present a petition to the Court for that purpose. *Nelles v. VanDyke*, 17 Grant, 14.

Leave to rehear refused, after considerable delay on part of party seeking to rehear, and where the ground for rehearing was an alleged error in the decree, which was not an obvious error, and caused no miscarriage of justice. *Lapp v. Lapp*, 4 Cham. R., 3.

RELATORS.

Costs of.

In a suit by the Attorney-General, on the relation of certain parties, the defendant was ordered to pay the costs of the relators. *Attorney-General v. Price*, 18 Grant, 7.

RELEASE.

Without advice, &c.

Differences having arisen between parties, trustee and *cestui que trust*, the latter (*A*) obtained against *B* (the trustee) a decree for an account, and large sums were in dispute between them. While the reference was pending, *B* got a release of the suit prepared for *A*'s signature: a friend brought *A* to *B*'s office, and *B* there induced *A* to sign the release in consideration of \$150 which he promised to pay. On a subsequent day *A* went for the money, and then at *B*'s request executed a quit claim deed of all his interest in the land. There was no evidence of the true state of the accounts at the time of these transactions. *A* was sober when he entered into them, and he understood their nature ; and *B* had no fraudulent purpose therein. *B* was a person of large business experience ; *A* had little, if any, business experience, and his habits were intemperate and thriftless ; and he executed the two instruments without the knowledge of his solicitor, and without advice : *Held*, that the instruments were void in equity. *The Edinburgh Life Assurance Company v. Allen*, 18 Grant, 425.

An old man whose mental faculties had been somewhat impaired by age, being in difficulties with his son, applied for advice to the attorney of persons against whom he had recovered a judgment for one debt and a verdict for another debt; the attorney obtained from him a release of the two debts without any consideration, and without his having any other advice in regard to the transaction; and the only evidence of what had passed between the two was the evidence of the attorney himself, the client being dead: *Held*, that the release could not be maintained in equity. *Dewar v. Sparling*, 18 Grant, 633.

The title acquired by a purchaser at Sheriff's sale of the husband's interest in his wife's lands is sufficient for a release from the husband and wife to operate upon. *Beattie v. Mutton*, 14 Grant, 686.

RELIEF.

Relief granted to a party who appeared only to shew cause. *Mulholland v. Downs*, 2 Cham. R., 233.

RENTS AND PROFITS.*Wilful Default.*

Where the plaintiff, being one of the heirs of an intestate, took upon herself to lease the lands in question, she was held liable to account for all the rents she had received, and for all that, but for her wilful neglect and default, she might have received, and in case it should appear on the inquiry before the Master, that she had so dealt with the property as to make her properly liable both for rents and profits, the Master was to report specially or separately; the costs of the account as to rents, to fall upon the estate, or be borne by the plaintiff, according to whether what was done by her was or was not beneficial to the estate. *Nash v. McKay*, 15 Grant, 247.

REPLICATION.

Taking off files.

Where a replication was filed several years after the filing of the answer by a different solicitor from the one who had filed the bill, but no order changing the solicitor had been taken out, and no notice of filing replication given, the replication was ordered to be taken off the files and the bill dismissed. *Rathbun v. Trighes*, 3 Cham. R., 160.

REPORTS.

Master's Report.

A motion to refer a report back to the Master will not be entertained in Chambers, although the Master certified that he had made a mistake. *Bentley v. Jack*, 2 Cham. R., 473.

A motion to refer a report back to the Master will not be entertained in Chambers, even on consent. *Graham v. Godson*, 2 Cham. R., 472.

Order made to refund money overpaid in consequence of a mistake in the Master's report. *Bank of British North America v. McDonald*, 2 Cham. R., 88.

A local Master, in making his report, is not at liberty to date it until the costs taxed by himself have been finally revised and settled by the Master in Ordinary under the General Orders. *Waddell v. McColl*, 2 Cham. R., 211.

RESTORING DISMISSED BILL.

See PLEADING—PRACTICE.

A motion to restore a bill dismissed for want of prosecution was refused, where great delay had taken place on the part of the plaintiff. *Davey v. Davey*, 2 Cham. R., 26.

A bill properly dismissed for want of prosecution will only

be restored under strong and special circumstances. Where an injunction bill had been dismissed, which had been filed to restrain proceedings at law, and judgment at law had been confessed on obtaining the injunction and afterwards on dismissal of the bill, money paid under the pressure of the judgment which it was now alleged was in excess of any due; a motion to restore the bill and take accounts between the parties was refused. *Hodgson v. Paxton*, 2 Cham. R., 398.

RESTS.

See MORTGAGE, &c., I. 9.

RETAINER.

If a firm, consisting of two or more partners, is retained, and one dies, it will be assumed that the retainer continues to the surviving partner or partners. *Alchin v. Buffalo and Lake Huron R. W. Co.*, 2 Cham. R., 45.

Retaining fee.

A retaining fee to a solicitor is not taxable. *Cullen v. Cullen*, 2 Cham. R., 94.

No retaining fee will be allowed to a solicitor who is himself also counsel. In re *McBride*, *Farley v. Davis*, 2 Cham. R., 153.

A retaining fee paid by executors to their solicitor in an administration suit, may, under certain circumstances, be a perfectly reasonable disbursement. *Chisholm v. Bernard*, 10 Grant, 479.

REVERSIONARY INTEREST.

An insolvent's reversionary interest in an estate passes to his assignee, and entitles the assignee to maintain a suit in a proper case for the appointment of new trustees, and for an account of the estate: But the Court refused to make an order for the sale of such reversionary interest. *Gray v. Hatch*, 18 Grant, 72.

REVIVOR.

Abatement—Discharging order, &c.

During the progress of an administration suit, and after the Master had made his report charging the executors jointly with receipt of assets of the estate, one of them died, and the plaintiff, by way of revivor, made his personal representative a party. A motion to discharge the order of revivor, on the ground that no abatement had taken place, was refused with costs. *Clouston v. McLean*, 14 Grant, 261.

Where, after a defendant's lands were seized under a writ of sequestration, the defendant died intestate, it was *held* that his widow was not a proper party to the order to revive. *Harris v. Meyers*, 16 Grant, 117.

A motion to discharge an order to revive cannot, without leave of the Court, be made after fourteen days from the service of the order; and mere service of notice within the fourteen days is not a sufficient compliance with the General Order 329. *Ib.*

The notice of motion in such a case need not set forth the previous proceedings. *Ib.*

Persons who acquired an interest in the subject of the suit before the suit was commenced, cannot be made parties by an order of revivor. *McKenzie v. McDonnel*, 15 Grant, 442.

REVOCATION.

Of Will—See WILL.

RIGHT OF RETAINER.

See EXECUTION, I. 7.

RIGHT OF WAY.

Way of necessity to grantee over the lands of grantor.

A being entitled at his own expense to make a road for himself across B's farm at the most convenient point, it was agreed between them that A should use B's road on certain terms: *Held*, that this agreement was a mere license, not coupled with any interest or incident or auxiliary to a sale or grant, and was therefore revocable, and being revoked at law, no equity arose to interfere with A's legal right on the ground of encouragement on the part of the one, or forbearance and irreparable inconvenience on the part of the other.

Semble. (Per Esten, V.-U.) That a way of necessity to a purchaser of land is the one most convenient to the grantee, by the shortest cut over the lands of the grantor. (Per Spragge, V.-C.) That the right to select such a way of necessity is qualified by the effect which the selection of a particular line would have upon the interest and convenience of the grantor. *Fielder v. Bannister*, 8 Grant, 257.

RIPARIAN PROPRIETORS.

1. A riparian proprietor has the same right to forbid others from backing water on his land as he has to prevent them from taking possession of any other vacant property he has, and making use of it against his will. Where it appeared that the defendants had backed water on the plaintiffs' mills and overflowed their land, but all the back-water or overflow was not occasioned by the defendants, and it was not clear on the evidence what proportion was attributable to them, or what alterations in their works were necessary to prevent the injury occasioned by the defendants, the Court directed an inquiry by an engineer named by the Court under the General Orders.

The works of a riparian proprietor should be sufficient to prevent damage to other riparian proprietors, not in cases of ordinary floods only, but also of the periodical or occasional

freshets to which the river is subject ; but this rule does not in equity apply to extraordinary freshets which cannot be guarded against or cannot be so by means consistent with the reasonable use of the stream. *Dickson v. Burnham*, 14 Grant, 594.

2. Where it appeared that the defendants had backed water on the mills of the plaintiffs, and overflowed their land ; but all the backwater or overflow was not occasioned by the defendants, and it was not clear on the evidence what proportion was attributable to them, or what alterations in their works were necessary to prevent the injury occasioned by the defendants : *Held*, that it was sufficient for the Court to declare the rights of the parties, and to enjoin any further backing or overflowing by the defendants ; and that the Court should not proceed to define the alterations in their works which the defendants should make. *Dickson v. Burnham*, 17 Grant, 261.

3. The use of bracket boards on a mill dam is such an easement as the Statute of Limitations will protect. *Cumpe'l v. Young*, 18 Grant, 97.

On a sale of a mill site, the vendor covenanted to secure to the vendee sufficient water for certain manufacturing purposes ; the deed did not state how the water was to be supplied ; but a dam was then standing, which afforded the necessary supply, and it did not appear that the covenantor had any other way of securing it : *Held*, that he, or any one claiming under him, was not entitled to a decree for the removal of this dam without supplying sufficient water in some other way : *Held*, also, that the grantee, his heirs and assigns, were entitled to use the water for other purposes, provided no more was used than the specified manufactures had required and used. *Rosamund v. Forgie*, 18 Grant, 370.

4. After the conveyance, other persons, unconnected with either party, erected mills above the dam, and used part of the water : *Held*, that this did not relieve the grantor, or those claiming under him by subsequent deeds, from the obligation to supply his first grantee with water, so far as the maintenance of the dam was a discharge of this obligation. *Ib.*

5. Certain riparian owners filed a bill against another riparian owner to restrain him from maintaining a dam ; other persons were interested in maintaining the dam, whom the plaintiffs did not prove any title to interfere with ; and one of the plaintiffs had sold a mill site to the defendant on verbal representations which implied that he was to have the benefit of the dam : The Court *held*, that if the plaintiffs had any claim against the defendant, the proper course was to leave them to their legal remedy against him ; and the bill was dismissed with costs. *Ib.*

6. In 1844 a mill site was conveyed to the defendant, " with the privilege of keeping the dam thereon at all times thereafter at its present head or height, but no higher," and in 1849 the defendant erected a new dam lower down the stream. This new dam was of the same height as the old dam ; but the defendant placed on the dam movable stop-logs to enable him to make use of the surplus water which would otherwise flow over the dam. By experiments it was shewn that if these stop-logs were not removed when the defendant's mill was not working, but in that case only, the water would be raised on the lands of the plaintiff to the extent of about $1\frac{1}{2}$ inches. The defendant, however, always had removed the logs when his mill was not working :

Held, per curiam, that under these circumstances the plaintiff was not entitled to an absolute injunction against the use of the stop-logs. [DRAPER, C.-J., VANKOUGHNET, C., and SERAGGE, V.-C., dissenting.] *Beamish v. Barrett* [In Appeal], 16 Grant, 318.

SALE.

Of Dower. See DOWER VI.

Of Goodwill. See GOODWILL.

By Sheriff. See SHERIFF'S SALES—MORTGAGE.

See also INFANTS VI.

GENERALLY.

1. *Where Master's directions not followed.*
2. *Instead of foreclosure where refused.*
3. *Of equity of redemption under execution.*

4. *Of timber—delivering possession.*
5. *Under judgment—priority.*
6. *Settling advertisement, confirming sale, &c.*
7. *Staying.*
8. *Trustee for.*
9. *Of notes.*
10. *Setting aside.*
11. *Miscellaneous cases relating to.*

1. *Where Master's directions not followed.*

When a sale has been had and the Master's directions have not been followed, the vendor will have to make out at his own expense, that all parties interested have not been injured' such non-observance, in which case the Master will confirm the sale, otherwise not. *Royal Canadian Bank v. Dennis*, 8 U. C. L. J. 85, 4 Cham. R.

2. *Instead of foreclosure where refused—Deposit.*

After a decree for foreclosure, the defendant applied in Chambers for an order for sale, the property mortgaged being worth \$1,000, and the mortgage being for \$157; and that the usual deposit might be dispensed with. The Secretary considered the General Order imperative, and refused the application. *Thompson v. Macaulay*, 3 Cham. R., 111.

3. *Of Equity of Redemption under execution.*

Where several lots of land are mortgaged, the equity of redemption in one or some of them only cannot be sold under common law process—and *Semble*, that where lands in different counties are mortgaged, the equity of redemption cannot be sold under execution at law, and can only be reached in equity. *Heward v. Wolfenden*, 14 Grant, 188.

Under the Statute authorising the sale under execution of the mortgagee's equity of redemption, Consol. Stat. chapter 22, the Sheriff cannot sell or convey any interest, if there is a second mortgage outstanding in the hands of different parties.

Where a first mortgagee acquired, as he contended, a title

through a purchaser at Sheriff's sale of the equity of redemption of the mortgaged premises, there being mesne incumbrances, it was held that he did not acquire the fee in the lands, the Sheriff not having power to sell. *Re Keenan*, 3 Cham. R., 285.

Sale, under fi. fa. of goods, of Equity of Redemption in portion of mortgaged leaseholds. Purchaser from Sheriff taking assignment of mortgage. Right of mortgagor to redeem.

The plaintiff's mortgage comprised leasehold premises held by defendant *R*, the mortgagor under two distinct leases. After a decree and final order for sale, the Sheriff of the county in which the leaseholds were situate advertised the interest of *R* in the premises comprised in one of the leases to be sold under a *fi. fa.* against the goods and chattels of *R*, and sold the interest to one *W*. *W* afterwards obtained from the plaintiff an assignment of his mortgage and entered into possession of the whole of the mortgaged premises, and received the rents and profits thereof, and was subsequently made a party plaintiff in the suit by revivor. Upon motion by *R* for a subsequent account and for reconveyance by *W* of the whole of the mortgaged premises upon payment of what was found due on taking the account; *Held*, that the sale by the Sheriff was invalid, and that *R* was entitled to a reconveyance of the whole premises upon payment of what should be found due to *W* for what he had paid the Sheriff upon the mortgage. *Goold v. Rich*, 4 Cham. R., 128.

4. *Of timber—Delivering possession.*

To make valid against creditors of the vendor, a sale of timber to be cut down by the vendor, there must be an actual delivery to the purchaser after the timber is cut down, followed by an actual and continued change of possession as in the case of other chattels. *McMillan v. McSherry*, 15 Grant, 133.

5. *Under judgment—Priority.*

Where a party purchased lands at Sheriff's sale under a judgment which had been registered before the registry of certain mortgages on the lands, although the mortgages had been

made before, it was held that the purchaser took priority and an estate in fee. *Montgomery v. Shortis*, 3 Cham. R., 69.

6. *Settling advertisement, confirming sale, &c.*

Under a decree for the sale of land or a competent part thereof, it is the mortgagor's duty to see to the parcelling out of the land directed to be sold, and if the mortgagor considers that too much is offered he should urge the objection at the time of settling the advertisement, and it should be stated in the advertisement that the unsold lots will be withdrawn from sale when the debt is realized, if that course is intended to be taken.

The confirmation of a sale may be opposed before the Master, and the sale disallowed on grounds which would afford material for a motion to set aside the sale.

Where the confirmation of a sale is opposed on the ground of there having been an unnecessary number of lots sold, the purchaser should be notified.

Semble, the objection will not prevail against an innocent purchaser, when urged against the confirmation of the report on sale. *Beaty v. Radenhurst*, 3 Cham. R., 344.

7. *Staying.*

Where an order staying a sale for three weeks was granted on the day the sale was to take place, and the Registrar telegraphed to the Master conducting the sale that such order was granted, and the message reached him after the sale, but before payment of the purchase money; an order made by a judge in Chambers, refusing an application to set aside the sale, was sustained by the full Court on rehearing. *Freehold Permanent Building Society v. Choate*, 3 Cham. R., 440.

8. *Trustee for.*

A executed to *B* a deed of his property in trust (amongst other things) to convert the same into money. *B* under the assumed authority of this deed mortgaged the property: *Held*, that the mortgage was not authorized by the trust for sale,

and was only valid to the extent of *B's* beneficial interest (if any) in the premises. *The Edinburgh Life Assurance Co. v. Allen*, 18 Grant, 425.

9. *Of notes.*

A loan of money was made for two months at two per cent. a month, at the expiration of which time it was contemplated a new arrangement would be made. After the expiry of the two months, no other arrangement having been effected, the Court held the lender entitled to claim interest at the rate originally agreed upon, and to sell the notes held by him as security, to repay himself the amount of his claim; subject only to the question whether he had sold the notes for the best price that could be obtained for them; and as to which the Court directed an inquiry before the Master. *O'Connor v. Clarke*, 18 Grant, 422.

10. *Setting aside sale.*

The holder of a mortgage having become himself the purchaser of the mortgaged property under a power of sale contained in the mortgage, and afterwards under a Sheriff's sale, sold and conveyed to a purchaser who went into possession and made permanent improvements. On his purchase being set aside, it was held that his vendee was entitled to be allowed for his improvements. *McLaren v. Fraser*, 17 Grant, 567.

Semble, the same rule would apply if the mortgagee himself had made the improvements. *Ib.*

The "highest bidder" at an auction sale is the "purchaser" under the General Orders of the Court, and the omission of the auctioneer to declare him the purchaser will not deprive him of his position.

The omission in an advertisement of sale to state that the premises are leased advantageously, will afford good grounds for staying the sale, but an application for such purpose should be made promptly and before sale.

Where the plaintiff, who had the conduct of the sale, assigned his interest, and an order to revive, making the assignee a party, was, a few days before the sale, taken out, but not served, and an order taken to substitute for the plaintiff's solicitor, the solicitor for the assignee, and the case went on under the control of such new solicitor, the Court set aside the sale, although reluctantly, as great delay had been shewn on the part of the mortgagor in making the application, and he was, under the circumstances, ordered to pay the costs incurred by the new sale. *McAlpine v. Young*, 2 Cham. R., 171.

11. *Miscellaneous cases relating to.*

It must appear clearly that the Master reports a sale beneficial for infants before a final order for sale will be made. *Edwards v. Burling*, 2 Cham. R., 48.

Where a debtor dies intestate, and his lands are sold under execution against his heir for the private debts of the heir, and the purchaser has notice before his purchase that there are debts of the ancestor outstanding, of which the creditors claim payment out of the lands seized, such purchaser takes only the beneficial interest of the heir, subject to the payment of the ancestor's debts. *Peck v. Bucke*, 2 Cham. R., 294.

Where an irregularity had occurred in advertising a sale, but no injury had thereby accrued, and a fair price had been obtained, the Court confirmed the sale. *Cayley v. Colbert*, 2 Cham. R., 455.

The Secretary in Chambers will not entertain a motion to confirm a sale where an irregularity has occurred, unless the sale has been approved of by the Master. *Thomas v. McRae*, 2 Cham. R., 456.

A sale will not be ordered until the mortgagor has had the usual time to redeem. *Trust and Loan Co. v. Reynolds*, 2 Cham. R., 41.

The principle upon which sales under decree of Court should be conducted, considered, and commented upon. *McDonald v. Gordon*, 2 Cham. R., 125.

SCANDAL.

In affidavit. See AFFIDAVIT, 2 (a).

Plaintiff filed a bill for specific performance of a contract, alleged to be made with defendant at an auction sale of lands at which plaintiff was a bidder; the defendant set up that plaintiff bought as his agent, that plaintiff was a *puffer*, and the sale illegal. Plaintiff moved to strike out the allegations as to the sale being illegal on the grounds stated as scandal and impertinence, and defendant moved that plaintiff submit to examination, he having refused to answer questions relating to the alleged fraudulent features of the transaction: *Held*, that the matter being material was not scandalous, and that plaintiff must answer all proper questions. *Jones v. Huntingdon*, 3 Cham. R., 117.

SCHOOL LAW.

Where a Board of School Trustees passed a resolution professing to adopt a permanent site for the school, and the resolution was confirmed at a special meeting of the ratepayers, duly called, these proceedings were *held* not to prevent a change of site in a subsequent year.

Where School Trustees selected a new site for the school-house, and at a special meeting of the ratepayers, duly called, those present rejected the site so selected, and chose another, but neither party named an arbitrator, *held*, that an arbitrator might be appointed by the ratepayers at a subsequent meeting.

The power of a County Council to change the site of a grammar school is not lost by the union of the grammar school with a common school, though, if the new site is not also adopted by the means provided by law for the case of a common school, the change may render necessary the separation of the schools.

Where the joint board of a grammar and common school, after the site for the grammar school had been changed by the County Council, wrongfully expended school money granted for

a grammar school building ; and a bill was filed against the Trustees, to restrain further expenditure, and to make them refund what had been expended, the defendants were ordered to pay the costs, but were allowed time to ascertain if all parties concerned would, under the special circumstances, adopt again the old site.

It is contrary to the rule of this Court, in dealing with persons who have not acted properly, to punish them more severely than justice to others renders necessary ; and, therefore, where School Trustees wrongfully expended money in building on a site which had been changed by competent authority, relief was only granted to a ratepayer who complained of the act, subject to equitable terms and conditions. *Malcolm v. Malcolm*, 15 Grant, 13.

Arbitration between Trustees and Ratepayers.

A dissent by School Trustees from a decision of the ratepayers as to a site for the school should be intimated promptly ; and if not announced till after the expiration of the current year, it is too late. *Coupland v. School Trustees of Nottawasaga*, 15 Grant, 339.

SECRET PROFIT.

W was the owner (subject to a mortgage) of property which *M* wished to buy ; *R*, becoming aware of this, entered into friendly negotiations with both, and bargained with *W* to take \$3,500, and with *M* to give \$5,600 for the property ; *R* concealed this difference from the parties. *W* conveyed to *M* ; on her signing the deed, *R*'s attorney paid to her the \$3,500 (less the mortgage debt), and on the deed being delivered to *M*, she (*M*) paid to *R*'s attorney the \$5,600. The facts afterwards coming to the knowledge of *W*, she filed a bill against *R*, claiming the balance of the \$5,600 ; and it appearing that in the negotiations he had given *W* to understand that he was acting in her interest, and had no interest of his own, the plaintiff was held entitled to a decree against *R* for such balance, with interest and costs. *Wright v. Rankin*, 18 Grant, 625.

SECRET TRUST.

See CONVEYANCE II. - SPECIFIC PERFORMANCE.

SECURITY FOR COSTS AND OTHERWISE.

SEE QUIETING TITLES, 21—PRO CONFESSO.

1. *Next friend.*
2. *Waiving.*
3. *For costs of appeal.*
4. *Of interpleader issue.*
5. *Staying proceedings.*
6. *Of infants.*
7. *Miscellaneous.*

1. *Next friend.*

The next friend of a married woman, who is co-plaintiff with her husband, will be required to give security for costs if it appears that he is a person of no known means, and his residence not known, though it appears that the husband has a substantial interest and is not a mere formal party to the suit. *Vanwinkle v. Chaplin*, 2 Cham. R., 98.

Held, qualifying *McBean v. Lilley*, 2 Cham. R., 247, as the decision in that case is stated in the head note: that the affidavit of a next friend that he is worth \$400 over and above all his debts, is only *prima facie* proof of his sufficiency as a next friend, and that evidence as to his circumstances may be given.

Where evidence contradictory to the affidavit was adduced, which in the opinion of the Court outweighed this statement, security or a new next friend was ordered. *Walker v. Walker*, 3 Cham. R., 273.

A *feme covert* plaintiff has a right to change her next friend without notice to the former next friend and without giving him security for the costs already incurred. But notice to the opposite party is necessary, because the order for security is only given on condition of the antecedent costs of the opposite

party being secured, if such a condition is desired by him. *Harvey v. Boomer*, 3 Cham. R., 11.

Where the next friend of a plaintiff has become insolvent and left the jurisdiction, the proper order to be made is, that proceedings be stayed until a solvent next friend be appointed, or until security for the costs be given. *McGoay v. Maladay*, 2 Cham. R., 437.

A next friend is liable for costs incurred while acting as such next friend, and not for other or past costs.

Where a next friend has been appointed, who proved to be an infant, and a new next friend was consequently appointed, an application to make the new next friend liable for the costs incurred before his appointment was refused. *Poole v. Poole*, 2 Cham. R., 459.

Where it becomes necessary to substitute a new next friend, the motion for the appointment should be on notice, and an order taken on *præcipe* is irregular. An order so taken was set aside with costs on the grounds of irregularity, and without going into the question of the solvency of the party appointed. *Bennett v. Sprague*, 2 Cham. R., 194.

2. *Waiving.*

Where a defendant had by answering waived his right to security for costs, and the plaintiff assigned his interest in the mortgage, the subject of the suit, to a party resident out of the jurisdiction: it was *held*, that the defendant was entitled to security for costs against the new plaintiff.

The fact that the suit was a foreclosure suit, was held not to disentitle the defendant to the order for security against the plaintiff, although a mortgagor, he disputing that anything was due, and the Master being directed to enquire "what, if any thing was due." *Thompson v. Callagan*, 3 Cham. R., 15

Security for costs will not be ordered to be given where a defendant has obtained further time to answer. *Arthur v. Brown*, 3 Cham. R., 396.

The filing of an answer is a waiver of any claim for security for costs. *Smith v. Day*, 2 Cham. R., 456.

3. Of appeal.

An application for leave to pay into Court \$400, as security for costs of an appeal from a certificate of title under the Quiet-ing Titles Acts having been granted by the Referee *ex parte*, and it not having been brought to his notice that the appeal was as to two separate parcels of land, one claimed by a husband and wife, and the other by the husband alone; it was *held* that the order was bad, as these facts should have been made known to the Referee, and the order under such circumstances made upon notice. *Re Howland*, 4 Cham. R., 6.

In bonds for security for costs of appeal, there should be two sufficient sureties, and, if one dies or becomes insolvent, another will be ordered to be substituted. *Brigham v. Smith*, 1 Cham. R., 334, overruled. *Saunders v. Furnivall*, 2 Cham. R., 159.

It is no objection to a bond for security of costs that there is no affidavit of execution annexed.

Neither is any affidavit of justification necessary until the solvency of the surety is questioned.

In the case of bonds for carrying a case to the Court of Appeal, an affidavit of justification is necessary under the Order of Court of Error and Appeal, No. 8.

A bond for security for costs need not be by two sureties unless the defendant, before the bond is prepared, gives notice that he requires two sureties. *Donnelly v. Jones*, 4 Cham. R., 48.

4. Interpleader.

The claimant under an interpleader issue, if out of the jurisdiction, is bound to give security for costs. *Walker v. Niles*, 3 Cham. R., 108.

5. Staying Proceedings.

The practice as to the perfecting of security to stay execution

on appealing from this Court is different from the practice on appeals at law. No motion is necessary here to allow the security: the onus of moving against the security being on the party objecting to it. *Heenan v. Dewar*, 3 Cham. R., 199.

A plaintiff suing *in forma pauperis* is not liable to have his suit stayed until he has paid the costs at law, or of a former suit in this Court, touching the same subject matter, unless it can be shewn that the proceedings are vexatious.

Where therefore a plaintiff had been ordered to give security for prior costs at law, and by another order the time for giving security had been limited and in default the bill ordered to be dismissed, and the plaintiff was afterwards admitted to sue *in forma pauperis*, the two orders for giving security were set aside. *Casey v. McColl*, 3 Cham. R., 24.

6. *Of infants.*

An infant, out of the jurisdiction, petitioning for relief, will be required to give security for costs. *Stinson v. Martin* 2 Cham. R., 86.

7. *Miscellaneous cases.*

An order directing security for costs to be given should name the sum for which the bond for security is to be given. *Ganson v. Finch*, 3 Cham. R., 296.

An application for an order for security for costs may be made after the expiry of the time for answering. *Ib.*

The fact that the defendant's solicitor knew that the plaintiffs had lands in the Province when he took out the order for security for costs was held a good ground of objection to the order. *Ib.*

An objection that the copy-order served was not endorsed with the name and place of business of the solicitor serving it was overruled, it not being shewn to have been the first proceeding taken by him. *Ib.*

On the plaintiff's shewing he had lands in the Province worth \$4,000, an order for security for costs obtained on *præcipe* was

set aside, and the order being also irregular in form, it was set aside with costs. *Ganson v. Finch*, 3 Cham. R., 296.

If a plaintiff, residing out of the jurisdiction, is shewn to have property in Upper Canada, an order for security for costs made against him will be set aside. *Galt v. Spencer*, 2 Cham. R., 92.

Where plaintiffs, who were resident out of the jurisdiction, had paid a certain sum into Court in lieu of security for costs, an application to have this money paid out to them was refused, although a decree for specific performance had been made in their favour, the suit not being finally terminated. *Luther v. Ward*. 2 Cham. R., 175.

Where it appears that the residence of the plaintiff is not known, and that there is reason to believe he has left the country, security for costs will be ordered to be given, although it does not appear by the bill that the plaintiff is resident out of the jurisdiction, and it is not shewn positively where he is resident. *Somerville v. Kerr*, 2 Cham. R., 168.

To bring a case within the Statute 29 & 30 Vic. ch. 24, requiring security for costs to be given where another action for same cause is pending, it must be clearly shewn the causes of action are identically the same, and not merely growing out of the same transaction.

And *quære*, does the Act apply at all to this Court, or where one action is at law and the other in this Court. *Dean v. Lamprey*, 2 Cham. R., 202.

Where, on a petition against a solicitor for an account, it was alleged, and not denied, that he had large sums of the client's money in his hands, the petitioner, though resident in a foreign country, was relieved from giving security for costs.

The rule requiring security for costs is not so positive and inflexible but that the Court will relax it in their discretion when the circumstances of the case require it. *Re Carroll*, 2 Cham. R., 305.

Where defendants took separate orders for security for costs, and the plaintiff obtained an *ex parte* order giving him liberty to pay \$400 into Court, instead of filing security by bond, the money so paid in was held to be security for all defendants, though the order recited one only of the orders for security. *Bolster v. Cochrane*, 2 Cham. R., 327.

A plaintiff will be ordered to give security for costs where it is shewn that he is insolvent and is carrying on the suit for the benefit of another party, who seeks to escape the risk of costs. *Mason v. Jeffrey*, 2 Cham. R., 15.

The recognizance of a committee of a lunatic, or of a receiver, will not be deemed sufficient under the Statute. *Re Ward*, 2 Cham. R., 188.

On an application for security for costs, it appeared that the plaintiff, though a resident of Canada, was in such circumstances as not to be good for the costs of the suit, should it go against him; that other persons were greatly interested in the subject matter thereof; that the plaintiff's success would materially benefit them; and that the defendant had already succeeded in an ejectment suit at law in respect of the same right on one of the grounds relied on by the bill; but there being no evidence that the plaintiff was actually put forward by the other persons interested to try the right, or that the suit was not brought entirely at his own instance: security for costs was refused. *Little v. Wright*, 16 Grant, 576.

SEQUESTRATION.

A writ of sequestration cannot regularly be issued on *præcipe*. Before such writs can be regularly issued, the order for the payment of the money must be served, and an affidavit of such service and of the non-payment filed.

A writ issued on *præcipe* was set aside, but without costs. *Fiskin v. Wride*, 2 Cham. R., 212.

Although, as was held in *Fiskin v. Wride*, a copy of the de-

decree or order, directing the payment of the money, should be shewn to have been served and a demand of payment of the money made, before a writ of sequestration can properly issue; yet where, as frequently has been done, a writ was issued without an affidavit filed shewing such service and demand, and the defendant had been aware of it for upwards of a year, and had appeared on a motion to compel a tenant to attorn, it was *held*, that he had waived any objection, and a motion to set it aside was refused. *Harris v. Meyers*, 2 Cham. R., 248.

The claim of a debtor to compensation for misrepresentation of parties in obtaining a patent of land, is not liable to be seized, attached, or sequestered before the amount is determined by decree or otherwise. *Roberts v. The Corporation of the City of Toronto*, 16 Grant, 236.

Chose in action.

A chose in action can be reached by process of sequestration, but the right or interest of a surety in regard to the money for the payment of which he is surety, is not property of such a nature as can be reached by that process. Where therefore a mortgagee filed his bill against the assignee of the equity of redemption, to enforce by this means payment of the deficiency arising on a sale of the mortgaged premises, it was *held*, that the right of the mortgagor to call upon his assignee to discharge the mortgage debt was not of such a nature as could be reached. *Irving v. Boyd*, 15 Grant, 157.

Rent to accrue due is not a chose in action, and a tenant in respect to it may attorn; but, where the tenant having been notified by the sequestrator, promised to pay him the rent in future, and afterwards, on being indemnified, paid it to a party claiming it as assignee, he was ordered to pay it over again to the sequestrator. *Harris v. Meyers*, 2 Cham. R., 121.

Delay in proceeding.

When a sequestration had issued to compel payment under a decree, and there appeared to have been considerable delay in enforcing the payment of rents, during which period the defend-

ant had died and one of his heirs had received sundry sums for rent, a motion that such rents be paid over again to the sequestrators by the tenants was refused, and the tenants ordered to attorn as to future rents only. *Harris v. Meyers*, 3 Cham. R., 107.

Powers of sequestrators as to making a lease.

Held, that sequestrators can lease for any period during which the rents would be less in the aggregate than the amount for which sequestration issued. *Harris v. Meyers*, 3 Cham. R., 89.

Reviving.

Where a sequestration to compel the performance of a decree had been issued against a person who subsequently died: *Held*, that the writ could be revived against his heirs.

Semble, That sequestration issued on mesne process cannot be revived. *Turley v. Meyers*, 3 Cham. R., 102.

A writ of sequestration had been taken out in a cause in which an order to revive had issued against the parties who would have represented the estate of a supposed intestate, had he been such; but a will had been subsequently found, and the revivor, it was contended, was irregular.

A motion to set aside the writ of sequestration, on this ground, and on the grounds that the defendants had proved, under the decree in the suit said to be thus irregularly revived, and that there were prior creditors to him, was refused with costs.

Semble,—The proper course, under such circumstances, would be to move against the order of revivor. *Meyers v. Meyers*, 4 Cham. R., 41.

SERVICE.

See MOTIONS—MARRIED WOMEN, VIII.

1. Where a married woman who had received an office-copy bill and order to answer separately by mail, accepted service in

writing, and returned the acceptance endorsed on the original order, it was *held* to be sufficient. *Keachie v. Buchanan*, 2 Cham. R., 42.

2. Service out of jurisdiction by mailing. *Woodside v. Street Railway Co.*, 2 Cham. R., 24.

The Court will not order service by publication of parties out of the jurisdiction who cannot be found, on the affidavit of the plaintiff alone. — *v. Corcoran*, 3 Cham. R., 298.

3. The service on a grown-up person must be at defendant's residence, and such person must be a resident there. *Elliott v. Beard*, 2 Cham. R., 80.

4. A warrant requires two days' clear service. *Sutherland v. Rogers*, 2 Cham. R., 191.

A solicitor's bill need not necessarily be served personally. Service on one of several clients, acting in conjunction by the same solicitor, but not co-partners, is sufficient service on them all.

5. Service on a solicitor appointed by one of several clients who had been active in the suit, and through whom instructions therein had been given, was deemed good service. *Re Morphy & Kerr*, 2 Cham. R., 82.

6. In mortgage suits, where the bill has not been personally served, it is not the proper practice to move for allowance of service. An order *pro confesso* must be taken out, and the cause set down and heard *pro confesso*. The decree in such cases is now made in Court, not upon *præcipe*. *Glass v. Moore*, 2 Cham. R. 327.

7. A foreign company having an office in Montreal and another in Toronto, an office-copy bill, with an indorsement to answer in four weeks, served on the agent in Toronto, was *held* sufficient service. *Irwin v. Lancashire Insurance Co.*, 2 Cham. R., 291.

8. Where, after an irregularity of service, the party having

the right to insist on it, serves a demand which it would put the other party to expense to fulfil, it waives the irregularity. *Carpenter v. The City of Hamilton*, 2 Cham. R., 282.

9. A written admission of service, and that the party making it was the defendant in the bill, made by a defendant served in Montreal, was received as sufficient proof of service, on an affidavit being filed of a party within the jurisdiction, proving the handwriting. *Erle v. Hunt*, 2 Cham. R., 395.

10. The mere fact of a defendant residing in England, is not sufficient ground for dispensing with personal service of an office-copy bill. *Everest v. Brooks*, 2 Cham. R., 445.

11. Service on the agent of the solicitor who had acted in the cause for defendant, was held good service, although the solicitor had been changed; but no order for changing the solicitor had been taken out. *Brown v. Bugar*, 2 Cham. R., 446.

12. Under peculiar circumstances, accounting for the delay, service of an office-copy will be allowed, although the time limited by the orders for service (twelve weeks) has elapsed. *Brooke v. Ninceas*, 2 Cham. R., 461; also, *Gourlay v. Riddell*, 158; *Broughall v. Hector*, 432; *Bolster v. Cochrane*, 327; *Re Newman*, 390; *Re Hare*, 417, in same volume.

Substitutional.

Substitutional service will not be allowed under the Act 1865, unless it is shewn that it would be very expensive or very difficult to effect a service. *Pearson v. Campbell*, 2 Cham. R., 25.

See, also, *Cupples v. Yorston*, 2 Cham. R., 31.

Where a defendant, who was made a party in the suit in respect of a mortgage held by him upon the land which formed the subject matter of the suit, was out of the jurisdiction, but it appeared that his solicitor had always had the mortgage in his possession, substitutional service on the solicitor was allowed. *Young v. Wilson*, 2. Cham. R., 56.

The administrator of a deceased mortgagee, having filed a bill against his heirs-at-law, one of whom lived abroad, in some unknown place, it was ordered that service of the bill on the sister of the absent defendant, and posting to him a copy of the order, addressed to the place where he had been last heard from, be deemed good service. *Cameron v. Baker*, 2 Cham. R., 281.

Where a mortgagee filed a bill for foreclosure against a mortgagor, who resided out of the jurisdiction, and whose residence, was unknown, whilst the security was scanty, service was ordered on the mortgagor's wife. *McDonald v. McMillan*, 2 Cham. R., 282.

Where the parties who would have become interested under a decree as next of kin are very numerous, and difficult to serve, the Court will dispense with service on them, and direct one of a family or class to be served. *Anderson v. Kilborn*, 2 Cham. R., 408.

SET OFF.

By shareholder.

The Act respecting railways declared a shareholder liable to judgment creditors of the company for "an amount equal to the amount unpaid on the stock held by him." *Held*, (reversing a decree of the late V.-C. ESTEN), that a shareholder in an action against him by a judgment creditor of the company could not set off in equity a debt due to him by the company before judgment was recovered—[VANKOUGHNET, C., SPRAGGE and MOWAT, V.-CC., dissenting.] *Macbeth v. Smart*—In Appeal, 14 Grant, 298.

By devisee and executor.

A testator who owed debts to an amount exceeding his personal estate, devised his land to one of his sons, whom he also appointed an executor; the devisee paid debts to an amount exceeding the personal estate, and left but one debt unpaid; the devisee became surety for the creditor to whom the debt was due, for an amount exceeding the debt so due by the testator; and the devisee subsequently gave a mortgage on the land devised to secure the amount he was surety for: *Held*, that the debt due by the testator was to be applied towards the

discharge of the sum for which the devisee had become surety. *Goldsmith v. Goldsmith*, 17 Grant, 213.

Of costs.

In a partnership suit the partnership was found indebted to the defendant, and, on the other hand, the defendant was liable to certain costs. The defendant having become insolvent, it was held that the plaintiff was entitled, notwithstanding the insolvency, to set-off the costs against the debt. *Brigham v. Smith*, 17 Grant, 512.

Costs of dismissed bill—Lien.

A bill had been filed for an injunction to stay an action of ejectment, which action the plaintiff successfully defended before any injunction could be obtained, he proceeded no further with his suit in equity, and the bill was dismissed with costs.

It was claimed that the costs at law should be set off as against these costs, but the Referee considered that costs at law could not be set off against costs in equity, that being the rule in England.

STRONG, V.-C., affirmed the order of the Referee as to the first point, and without expressing any opinion as to whether costs at law could be set off against costs in equity in a proper case, affirmed the order of the Referee in this point also, on the ground that the lien of the attorney attached, and was paramount to any right to set off. *Webb v. McArthur*, 4 Cham. R. 78.

SETTLING ADVERTISEMENT.

See SALE.

SHERIFF.

Amending Return. See AMENDING.

I. SHERIFF'S DEED.

II. SHERIFF'S POUNDAGE.

III. SHERIFF'S SALE. See also WILL, X. 10.

I. SHERIFF'S DEED.

A Sheriff's deed described the property conveyed as "about fifteen acres, more or less, being the whole of a block or piece of land adjacent to the Grand Trunk Railway, being a part of lot number twenty-seven in the first concession of South Easthope, now in the Town of Stratford."

Held, that this description was insufficient and the deed void. *Davidson v. Kieley*, 18 Grant, 494.

II. SHERIFF'S POUNDAGE.

Where a Sheriff had moneys in his hands which were properly applicable to paying off certain executions in his office, but the debtor having otherwise arranged with the plaintiffs in the writs, obtained from them orders on the Sheriff for payment of the amounts coming to them respectively, but these the Sheriff refused to pay, unless the debtor would consent to pay the full amount of his poundage, as if a sale had taken place, which under the circumstances he was not entitled to claim; and defended an action brought to recover the amount, in which the Sheriff succeeded in defeating the plaintiff. This Court, on a bill filed against the Sheriff, granted a decree for an account, and ordered him to pay the costs up to the hearing. *Davies v. Davidson*, 14 Grant, 206.

III. SHERIFF'S SALES.

A debtor being a vendee of land and in default in paying the purchase money, a creditor obtained execution against his lands, and at the Sheriff's sale became the purchaser of the debtor's interest for a sum equal to the debt and costs, and took the Sheriff's deed accordingly: *Held*, that he could not afterwards repudiate the purchase and claim his debt, on the ground that the debtor's interest was not saleable by the Sheriff. *Ferguson v. Ferguson*, 16 Grant, 309.

A debtor executed two mortgages, a portion of the land comprised in one of them being comprised in the other, and his interest in all the land was sold under execution.

Held, that the sale was invalid. *Wood v. Wood*, 16 Grant, 471.

SIGNATURE TO INFORMATION.

See PLEADING IV.

SOLICITOR.

See MARRIED WOMAN, II.—COSTS, I. 3-13—TAXATION—
VENDOR AND PURCHASER.

I. HIS DUTIES, LIABILITIES, &C. AND SUMMARY JURISDICTION
OF COURT OVER.

II. SOLICITOR AND CLIENT.

III. LIEN OF.

IV. CHANGING.

I. HIS DUTIES, LIABILITIES, &C., AND THE SUMMARY JURISDICTION
OF COURT OVER.

The Court of Chancery will exercise a summary jurisdiction over solicitors of that Court, and order them to pay over moneys of clients in their hands. Where, therefore, it was shewn that a client had paid his solicitor \$1,800 to be applied in carrying out an agreement to purchase entered into by him, and which, they informed him, they had paid into Court, but had not done so, they were ordered to pay the amount in ten days.

It being shewn also, that a bill for specific performance, instituted by them as his solicitors to enforce the said agreement, had been dismissed with costs for want of prosecution owing to the default of said solicitors: the costs so paid were not included in the above-mentioned order, but the client was left to his action at law: so also with respect to money paid to the vendor and lost by the negligence of such solicitors, and money paid to them on account of their own costs. *Re Toms & Moore*, 2 Cham. R., 381.

Where a solicitor appeared to represent parties who had been served with notice, being claimants in the Master's office, but were not the least interested in the question then at issue, and asked for costs: the Court regarded his conduct "such as ought to be discouraged by this Court," and refused him costs. *Simp-*

son v. Ottawa Railway Company, 2 Cham. R., 226; see also *Re Carroll*, 305; *Re Walker*, 324, in same volume.

It is the duty of a solicitor before commencing a suit to examine the instrument on which the suit proceeds; or, in case of its loss, to use due diligence in resorting to the means of information which are open to him, and to which he is referred by the client. *Roe v. Stanton*, 17 Grant, 389.

Where this duty has been omitted, and the instrument sued upon had in consequence been set forth so incorrectly in the bill, that the proceedings were useless, and had to be abandoned after decree, the solicitor (though he had acted in good faith) was held not to be entitled against his client to the costs of the suit.—*Ib.*

The solicitor of a party has not, as such, any authority to enter into a contract for the sale of his client's lands. *Cameron v. Brooke*, 15 Grant, 693.

Mortgages were delivered to a solicitor by his brother for collection, and the money was collected thereon. A dispute arose as to whether such solicitor was alone responsible to his brother, or whether the solicitor's partner was responsible also for the moneys collected. On petition of the client for payment of the money, the Court refused to make an order against the partner, holding that the petitioner should be left to bring a suit at law or in equity as he might be advised. In *re Toms & Moore, Solicitors*, 3 Cham. R., 41.

Where an order for the delivery and taxation of bills of costs had been taken out on *præcipe* on the application of the administrator of the person who employed the solicitor, and the fact that the solicitor disputed the retainer by such person, was not brought to the notice of the Court on the issuing of the order but it was established that the administrator did not know when taking out the order that the retainer was disputed: *Held*, that there was no suppression of a material fact on the part of the administrator, and that the order was regular.

The Court will *sua sponte*, where the circumstances appear to

warrant it, take notice of the conduct of its solicitors, and investigate matters in which their acts seem open to suspicion.

Where witnesses directly contradict each other, the presumption is, not that one speaks falsely, but that one has forgotten the circumstances, unless the facts distinctly repel such an assumption. In investigating a charge instituted by the Court against a solicitor, and which if established would have proved of a very grave nature, the Court acted on the above principle and accepted the solicitor's explanation of the facts, although distinctly contradicted by the client. In *Re Toms, A Solicitor*, in the matter of *M. C. Cameron*, 3 Cham. R., 204.

Where a solicitor had been appointed by the Master to represent certain creditors as a class, and one of such creditors, in an affidavit filed by him, repudiated the act of such solicitor: *Held*, he was bound by the solicitor's proceedings.

Held, further, that the solicitor was not only authorized to act for such creditors in the proceedings in the Master's office, but also in proceedings arising out of or connected with these, —such, for instance, as a motion in Chambers on their behalf. *Re McConnell*, 3 Cham. R., 423.

In case of a sale under a power in a mortgage, the solicitor of the mortgagee cannot become the purchaser, though the proceedings for the sale were not taken in his name, and it was not shewn that any loss had occurred by reason of his being the purchaser. *Howard v. Harding*, 18 Grant, 181.

Where a solicitor adopts a course which is obviously unreasonable and perverse, the Court will order him to pay the costs occasioned by such conduct. Where, therefore, a solicitor refused to leave with the Master a mortgage under which he claimed on behalf of a creditor, and the Master disallowed the claim as not being proved, the Court, on appeal, refused to interfere with the Master's finding, and made an order for costs against both the solicitor and client.

Under the circumstances above stated, the Court gave the client (the creditor) a further opportunity of proving his claim

unless the solicitor should shew that he acted under express instructions. *Brigham v. Smith*, 2 Cham. R., 462.

Where the defendant's solicitors, through the neglect of their clerk, were not aware till after the hearing, that the cause had been set down, or notice of hearing served, and the question raised by the answer was as to defendant's liability on a judgment recovered against him by his solicitor; the Court allowed a new hearing after the decree was drawn up and entered, on payment of costs.

The application for such a purpose should be by petition to the Court, and not by motion in Chambers. *Donovan v. Denison*, 2 Cham. R., 284.

A solicitor is liable to account for moneys or securities in his hands, under the summary jurisdiction of this Court, although such moneys or securities may have come to his hands as an agent for the owner, and not strictly in his character of solicitor or attorney, or involved any duty as such in the holding or possession of them. *Re Carroll*, 2 Cham. R., 223.

II. SOLICITOR AND CLIENT.

Conveyances obtained by a solicitor from his client must state the transaction correctly: and the solicitor must preserve evidence that an adequate price was paid, and that the transaction was in all respects fair, and such as a competent and independent adviser of the client would have approved of. *Oakes v. Smith*, 17 Grant, 660.

Where these obligations are neglected, the suit of the client must be brought within the statutory limit of twenty years; but an unexplained delay of less than that period may, under circumstances, be a bar. Where nineteen years had elapsed, and the delay was accounted for, the heirs of the client were held entitled to relief.—*Ib.*

Solicitor and client—Negligence—Postponing sale—Costs.

A client who had a mortgage of certain premises instructed his solicitor to institute proceedings on the mortgage. The

solicitor omitted to make *J*, the owner of the equity of redemption in a portion of the property, a party to the suit. The remaining portion having been sold under a decree in that suit, the client was benefited to some extent by the proceedings therein, although his remedy against *J* was gone. In proceeding afterwards to tax the solicitor's bill under a common order obtained by the client, the Master allowed the costs of these proceedings; and on appeal to the Court such ruling of the Master was upheld.

The Master, in proceeding to tax a solicitor's bill, under the common order for taxation, has no authority to institute an inquiry as to loss sustained by the client through the alleged negligence of his solicitor; and the costs of such inquiry cannot be charged to the solicitor. *Thompson v. Milliken*, 15 Grant, 197.

Where a solicitor incurs useless and unnecessary costs by instituting a suit in the Court of Chancery in respect of a subject matter within the jurisdiction of the County Court, the surplus of the costs in Chancery over the Inferior Court tariff will not be allowed to him against his client.

Where in a suit brought as above, the costs in Chancery had been disallowed *in toto* between the parties, the Master allowed the plaintiff's solicitor County Court costs, the client having through the exertions of his solicitor derived some benefit from the suit. *Re Hardy—Poole v. Poole*, 3 Cham. R., 179.

Vendor and purchaser—Solicitor selling—Latent defect.

An attorney, in selling property of which he was the apparent but not real owner, acted for the purchaser, who had confidence in him and employed no other solicitor in the matter. The attorney did not disclose to the purchaser the true state of the title, but alleged it to be good, though without any fraudulent intention, the true owner having, after the conveyance

was executed, recovered the property from the purchaser: *Held*, that the purchaser was entitled to have his payments and expenditure on the property made good to him by his vendor, and that the latter was not protected by having given only limited covenants for title. *McRory v. Henderson*, 14 Grant, 271.

Notice.

Where such motives exist in the mind of a solicitor as would be sufficient with ordinary men to induce them to withhold information from the client, the presumption is that it was withheld, and the uncommunicated knowledge of the Solicitor is not imputed to the client as notice. *Cameron v. Hutchinson*, 16 Grant, 526.

A client is bound by a consent of his solicitor entered into in good faith. *Bailey v. Bailey*, 2 Cham. R., 58.

A solicitor should not treat with a party to a cause in the absence of the solicitor of such party. *Bank of Montreal v. Wilson*, 2 Cham. R., 117.

Solicitor, how far he binds his client by an arrangement made without instructions—Affidavits.

An agreement entered into by a solicitor that his client's suit should abide the event of a certain other suit by the same plaintiff against another party, such agreement being made without instructions from the client, who afterwards repudiated it, *held*, not to be binding on the client. *Dewar v. Orr*; *Dewar v. Sparling*, 3 Cham. R., 224.

A party alleged that he had been induced by the plaintiff's solicitor to allow his name to be used as next friend, on the assurance that he would not be rendered liable to costs; this was denied by the solicitor. It was considered that such a fact could not be established by *ex parte* affidavits. *Burgess v. Muma*, 2 Cham. R., 43.

The Court will relieve a suitor against difficulties occasioned by a solicitor. Where a defendant moved to dismiss the plaintiff's bill, the plaintiff having failed to comply with an undertaking, such failure having arisen through a slip of the plaintiff's solicitor, the application to dismiss was refused. *Devlin v. Devlin*, 3 Cham. R., 491.

III. SOLICITOR'S LIEN.

A solicitor's lien on title deeds for his professional services attaches and continues, although the property to which they relate has passed from the ownership of the client, for whom they were performed, by sale and purchase under a power of sale contained in a mortgage. The purchaser takes the interest of the mortgagor, subject to such lien. *Gill v. Gamble*, 2 Cham. R., 135.

In a suit to wind up a partnership, the plaintiff's solicitor carried on proceedings till a decree was obtained and some progress made with the reference thereby directed. The plaintiff then became embarrassed, proceedings were stayed for a few months, and plaintiff at length assigned to a creditor in whose name, acting by another solicitor, the suit was revived, and a sum was ultimately found due to him: *Held*, that the solicitor of the original plaintiff had not lost his lien for costs, but was entitled to be paid, next after the satisfaction of the costs of the solicitor of the plaintiff who had conducted the suit to its conclusion out of the fund realized. *Clark v. Eccles*, 3 Cham. R., 324.

Under what circumstances lien held not to exist. *Browncomb v. Tully*; *Re Fairbairn*, 3 Cham. R., 71.

The agent of a solicitor has a lien on the papers, or on a fund recovered against his principal, and to the same extent against the principal's client, and such client is justified in paying the agent so as to discharge such lien and obtain his papers.

Where the client had paid the Toronto agent who retained the bulk of the funds recovered on account of his agency bill, and offered the principal the balance, who refused it, and issued execution against the client for the whole amount ; such execution was stayed with costs.

The agency charges in this case were wholly for work in the suit in which the client was a party, *sed quære*, would the solicitor's lien attach for the amount of his agency bill generally *Re Cross*, 4 Cham. R., 11.

IV. CHANGING.

A solicitor may be changed without an order in our Court. It is otherwise in England. *Bailey v. Bailey*, 2 Cham. R., 57.

SPECIALTY OR SIMPLE CONTACT DEBT.

A surety for an administrator deceased, who was indebted to the estate, on judgment being recovered against him, paid the amount and took an assignment of the administration bond to a trustee for himself. *Quære*, whether the debt to the surety was a specialty or a simple contract debt. *Re Whittemore*, 2 Cham. R., 17.

SPECIFIC CHATTELS.

Several persons united in purchasing a printing press and material for the establishment of a newspaper to advocate certain views, and agreed with a printer that he should establish the newspaper, and should have a legal transfer of the property purchased on paying to the several parties the sums they had respectively contributed. This agreement was acted on, and the printer paid some of the contributors accordingly. One of the parties, who claimed that he had not been paid, took possession of the press and material by means of a writ of replevin :

Held, that the printer was entitled to relief in equity, and an injunction was granted to stay proceedings in the replevin suit on security being given. *Dewhurst v. McCoppin*, 17 Grant, 572.

SPECIFIC PERFORMANCE.

See STATUTE OF FRAUDS—HUSBAND AND WIFE—PRACTICE
—FRAUD, &c.—LEASE—ATTORNEY AND CLIENT.

- I. CASES WHERE PERFORMANCE DECREED.
- II. CASES WHERE DECREE REFUSED.
- III. WHERE NOT HELD BARRED BY LAPSE OF TIME.
- IV. MISCELLANEOUS CASES.

I. CASES WHERE PERFORMANCE DECREED.

Restraining suit for purchase money—Injunction.

The vendor of real estate having died before the conveyance of property agreed to be sold, leaving infant heirs, the purchaser, instead of proceeding to enforce the contract in this Court, instituted proceedings at law to recover back the purchase money paid, partly to the vendor and partly to his administrators, whereupon a bill was filed by the representatives of the vendor, seeking to restrain the action at law and for specific performance. The Court made the decree as asked, and ordered the defendant to pay costs up to the hearing. *Van Wormer v. Harding*, 14 Grant, 165.

Personal services—Injunction.

The plaintiff *H* being in possession of land belonging to the defendant and being entitled to retain such possession for another year, the defendant, in order to obtain immediate possession agreed that in consideration thereof he would give another piece of land to the plaintiffs, husband and wife, for the life of the wife, the husband further agreeing that he would look after and take care of the former property whenever the defendant was absent, and would, during winter, see to the defendant's cattle and stock. In pursuance of this agreement pos-

session was delivered of the respective parcels, and the husband rendered some services, being all that were required of him. The defendant having afterwards brought an ejectment suit against the plaintiffs, the Court *held* the agreement enforceable, notwithstanding the stipulation as to personal services to be rendered, and granted an injunction. *Hewitt v. Brown*, 16 Grant, 670.

Of agreement for water privilege.

A vendor agreed that the purchaser should have sufficient water to drive a saw mill and other machinery : in a suit by the vendor against the purchaser, the Court decreed a specific performance of the contract, treating the water and the use of the dams and booms as sold with the land : the decree to provide for this, with liberty to parties to apply from time to time. *Hincks v. McKay*, 14 Grant, 233.

Time for paying purchase money.

There is no fixed rule in England as to the time to be given by a decree for paying purchase money before the vendor is entitled to a rescission of the contract for the default.

Where the decree in a vendor's suit for specific performance directed payment in a month, the Court, on a subsequent application to rescind the contract, gave the defendant, under the circumstances, a further period of four weeks to pay after service of the order; and ordered on default a rescission. *Tyler v. Lauder*, 15 Grant, 99.

Of exchange of lands.

The plaintiff and defendant agreed to an exchange of lands, the plaintiff conveying 100 acres in *B*, upon which there was a mortgage for \$1,300, and the defendant agreeing to convey to the plaintiff whichever of two lots—one in *T*, the other in *S*—he should select : in the event of his selecting the latter it was to be assigned to him, subject to the payment of \$150 in four equal annual instalments, with interest at seven per cent. The plaintiff selected the latter, but it appeared that the defendant

had not yet obtained a title thereto, although he was in a position to call for a patent from the Crown on making certain payments, and which he procured the day the cause was heard. The Court, as the defendant had all along had a title to the lot, and was at the time in a position to carry out his part of the agreement, and submitted to do so, directed that the contract should be completed by conveyance of the lot in *S*, and that the time for payment of the \$150 should date from the hearing ; from which time also the interest should be computed. *Gray v. Reesor*, 15 Grant, 205.

The defendants, who had some interest in gold lands, having discovered the owner of an outstanding title, employed the plaintiff to buy up the same ; agreeing to give the plaintiff one-fourth of the land for his trouble on his paying one-fourth of the consideration, and to re-convey to the owner of such title another one-fourth part. The title having been bought up the defendants did re-convey the one-fourth to the owner, but refused to carry out the agreement with the plaintiff : *Held*, that the agreement was such as this Court would specifically perform, and decreed the same accordingly with costs. *Bogart v. Patterson*, 14 Grant, 624.

Time essence of contract—Tender of payment when not essential.

Where the agreement was that the defendant should advance money on the purchase of land, and that the plaintiff should have the right to re-purchase the same by a certain day upon repayment of the amount so advanced, and interest, together with what was paid by the defendant for improvements and insurance, and it was expressly stipulated that time should be of the essence of the contract : *Held*, that although the Court as a general rule will hold a party to perform such a contract within the time limited, yet it is not ousted of its jurisdiction, but will admit him to shew a good and valid reason for its non-performance within such time, and in that case may order specific performance.

The defendant having neglected to furnish a statement of his claim in respect of the advances made by him in pur-

suance of the agreement between the parties, and in consequence thereof the plaintiff was unable to tender the proper amount due the defendant, it was considered that the plaintiff was exonerated from making any tender. *McSweeney v. Kay*, 15 Grant, 432.

Possession—Delay—Part performance.

An undertaking as surety must, to comply with the Statute of Frauds, name the person to whom it is given.

Where a guarantee did not sufficiently comply with the Statute of Frauds, but the transaction related to an interest in lands for one year, and the principal had gone into possession under the contract, and retained possession: *Held*, that the contract was binding on both principal and surety, on the ground of part performance.

In such a case some of the sureties, some weeks after possession was taken, refused to sign a formal lease. No proceedings were taken to enforce their undertaking until the year had expired and the principal had given up possession, a defaulter in respect of his rent: *Held*, that the delay was no bar to the suit. *The Corporation of the County of Huron v. Kerr*, 15 Grant, 265.

Continued possession by a tenant, coupled with acts inconsistent with a tenancy, is sufficient part performance to let in parol evidence of a contract of sale. *Butler v. Church*, 16 Grant, 205.

On a sale of land, it was agreed that the purchaser should have the privilege of paying the price by doing certain chopping on other lands of the vendor. No time was fixed for this work. On a bill by the purchaser for specific performance: *Held*, that he was not to be treated as in default, so as to lose his right to specific performance, without proof of having neglected to do the work after being requested to do it. *Brand v. Martin*, 16 Grant, 566.

Statute of Frauds.

In pursuance of a verbal agreement for the sale of lands, the purchase money being payable by instalments, to be secured by mortgage on the premises bargained for and other lands owned by the purchaser ; a deed and mortgage were drawn up, which were signed and sealed by the vendor and mortgagor respectively—neither instrument referring to the other, and the deed expressing that the purchase money had been paid. The vendor and mortgagor took away the respective instruments signed by them, for the purpose as alleged, of procuring the execution thereof by their respective wives. The vendor subsequently refused to perfect the transaction, and on a bill filed by the purchaser for specific performance : *Held*, that the conveyance so executed by the vendor was a sufficient contract of sale within the Statute of Frauds ; that the presumption on the face of such instrument was that the purchase money had been paid ; which being admitted by the plaintiff to be incorrect, the purchaser was entitled to a decree for specific performance, paying the price in hand. *Gillatley v. White*, 18 Grant, 1.

II. CASES WHERE DECREE REFUSED.

Laches.

The intestate contracted with the defendant, *George Brown*, for the purchase of a village lot in Bothwell, and paid part of the purchase money. The vendor afterwards agreed to erect certain buildings on the premises, for which the purchaser was to pay by instalments, and the vendor was to hold possession and receive the rents meanwhile on account. The purchaser having made default, died intestate, leaving no other means. The heirs lay by for a number of years, and until oil was discovered near Bothwell, and property had in consequence risen in value, and they then filed their bill to enforce the purchase, but the Court dismissed the bill with costs on the ground of laches. *Walker v. Brown*, 14 Grant, 237.

Of agreement to lease.

Where two of four trustees entered into an agreement for the lease of trust property, to the plaintiff but without the

knowledge or assent of the other two, to whom under the circumstances notice of the agreement could not be imputed, specific performance of the agreement was refused. *McKelvey v. Rourke*, 15 Grant, 380.

Injunction, &c.

An agreement for a lease provided for the building of a barn by the tenant ; the assignee of the owner, considering that a barn which the tenant had begun to build was not such as the agreement required, filed a bill for an injunction, and for specific performance of the agreement generally. The answers insisted that the barn was such as the defendant undertook to build ; the Court being of opinion that the injunction was the real object of the suit, and that the plaintiff was not entitled to an injunction, dismissed the bill : *Held*, that the decree was no bar to a subsequent suit by the tenant for specific performance of the agreement for a lease. *Simmons v. Campbell*, 17 Grant, 612.

Of agreement with Railway Company.

The owner of land granted to a railway company the privilege of crossing his property, in consideration of which the company agreed, amongst other things, to pay him \$400 a year, to carry flour for him on certain favourable terms, and "to bottom out his present mill race from its present unfinished point" : *Held*, that this was a contract such as this Court should not decree a specific performance of, or damages for breach of it ; but leave the plaintiff to sue upon it at law *Dickson v. Covert*, 17 Grant, 321.

Of agreement not acted on.

A contract in writing for the sale of land had not been acted on during the vendor's life ; possession was afterwards taken by the vendee, but no improvement was made. In a suit for specific performance brought by the vendor's heirs against the vendee's heirs after the latter had come of age, evidence was given which threw considerable doubt on the contract : *Held*,

that the doubt was sufficient to prevent the contract being enforced. *Kelly v. Sweeten*, 17 Grant, 372.

Of agreement only partly expressed.

A, who was the lessee of a timber limit, had an interview with B on the subject of a sale to him of part of the limit. A offered to take \$400, and letters passed which amounted to a contract at law to sell at that price. A's offer, however, had been made in contemplation of a reservation and condition which had been spoken of at the interview between the parties, but were not mentioned in the letters: *Held*, that the purchaser was not entitled in equity to a specific performance without the reservation and condition. *Needler v. Campbell*, 17 Grant, 592.

Of agreement between father and son.

A father and son entered into mutual bonds, the father agreeing that just before his death he would convey his farm to the son in fee; and the son agreeing that he would, during his father's life, work, till, and improve the farm in a good and farm-like manner; and would consult his father in all things reasonable: quarrels took place afterwards; the son treated his father badly, though he did nothing which at law would be a breach of the condition of his bond; and ultimately the father left the farm, the son retaining possession until ejected at the father's suit: *Held*, in a suit by the son against his father, that the contract should not be enforced against the father. *McDonald v. Rose*, 17 Grant, 657.

III. WHERE NOT BARRED BY LAPSE OF TIME.

In 1846 the defendant contracted for the sale of a building lot in Toronto to the plaintiff's father (one of the defendant's workmen) for \$500, payable in eight annual instalments; the purchaser went into possession and built two small houses on the lot. He died in 1856 intestate. The plaintiff, who was his only child, immediately afterwards enlisted and left Canada, leaving a power of attorney with one A to manage his affairs; he was not quite of age at this time: in February, 1859, the

defendant brought ejectment, and *A* in the following March filed a bill in plaintiff's name for specific performance of the contract ; the defendant claimed that there was about \$800 due thereon, and the claim appeared to be confirmed by a book produced by a book-keeper of the defendant who was examined as a witness ; the value of the property at the time was about \$700 : *A*, believing the plaintiff's representations, agreed with him to dismiss the bill without costs, which he accordingly did, and gave up possession to the defendant. Some years afterwards the plaintiff returned to the province, and discovered that not one-half the amount so claimed by the defendant was due at the time of dismissing the bill, and thereupon filed a bill for specific performance, and proved this state of the account from entries in the books of the defendant and otherwise : *Held*, in view of the misrepresentations of the defendant, and the absence of the plaintiff, that the plaintiff's right to a decree was not barred by lapse of time. *Larkin v. Good*, 17 Grant, 585.

IV. MISCELLANEOUS CASES—COSTS.

Costs.

The general rule in England is, in a suit for specific performance, that where an abstract of title has been demanded, and a vendor only makes out a good title after bill filed by him, he will be ordered to pay the costs of the suit ; but where the question really in issue between the vendor and purchaser was other than of title, and was decided against the purchaser, the Court gave the vendor the costs of the suit, although a good title had not been shewn until after bill filed, no abstract having been demanded previously. *Haggart v. Quackenbush*, 14 Grant, 701.

Mortgage by vendor after contract.

A party after making a contract for the sale of land mortgaged it, and then filed a bill for specific performance. The mortgage not being due the Court on the hearing directed an inquiry whether the plaintiff could make a good title free from

incumbrance ; and reserved further directions and costs in case the Master should find the plaintiff could not clear up the title. *McDougal v. Miller*, 15 Grant, 505.

Compensation.

The advertisement of sale of a farm described the property as being "96 acres cleared and cultivated, a good log house and frame barn 69 by 32 on the premises ; also, driving shed." Upon a survey of the property being made, it appeared that the quantity of cleared land was $74\frac{3}{4}$ acres under cultivation and legal fence, and $12\frac{1}{4}$ acres of pasture land, with some girdled trees standing, and a few logs lying upon it, which had never been cultivated and could not be until the logs should be removed ; the dimensions of the barn were 50 feet by 30, and there was no driving-shed upon the property. On a bill filed by the vendors for specific performance of the contract : *Held*, independently of a stipulation in the conditions of sale providing for errors in the advertisement, that these differences were such as entitled the purchaser to be compensated therefor ; and the vendors, having disputed the purchaser's right to such compensation, were ordered to pay the costs of the suit. *The Canada Permanent Building Society v. Young*, 18 Grant, 566.

Reforming deed—Fraud—Conflicting equities.

The defendant, a man of weak intellect, was fraudulently induced to execute a quit-claim deed of certain land to which he was entitled as heir-at-law, but no consideration was given for such deed. The land was afterwards, conveyed to the plaintiffs in these suits for valuable consideration. After the lapse of more than fifteen years, the defendant brought ejectment against the plaintiffs, and it was decided that the legal title had not passed by the deed executed by him. The plaintiffs thereupon instituted proceedings in this Court to reform the deed executed by the defendant, or treating it as contract only for a specific performance thereof : *Held*, (1st.) That though the plaintiffs had equities as purchasers for value, yet the defendant had an equity to set aside the deed he was deceived into executing ; and that his equity being the elder,

and having the legal title in his favour, the Court could not interfere to give the plaintiffs relief; and (2nd.) That though the laches and acquiescence of the defendant for so long a period might be a reason for refusing him relief where he in Court as a plaintiff, still they did not constitute a ground for granting the plaintiffs the relief sought, and under the circumstances, the Court dismissed the bill with costs. *Livingstone v. Acre*; *Wallace v. Acre*, 15 Grant, 610.

STATUTE.

29 *Vic.*, Chap. 28, Sec. 33. See ADMINISTRATION, V.

STATUTE OF FRAUDS.

See PARTNERS—SPECIFIC PERFORMANCE.

Parol Contract.

The plaintiff, who was the licensee of the Crown of certain "timber limits," entered into an arrangement with J. N. & Co., whereby they were to make advances to him to the extent of \$6,000, to enable him to get out timber during the then coming season, such timber to be consigned to them, and they were to be allowed a certain commission on sales, and interest on moneys advanced by them. And it was agreed that the plaintiff should transfer to them his interest in such timber limits, as a security for the payment of any balance arising on the said transaction; which was done. Afterwards the plaintiff and J. N. & Co. continued to deal on the like terms, it was agreed between them, verbally, that the transfer already made should stand as a security for advances to be made by them upon subsequent transactions: *Held*, that the subject of the contract was such an interest in lands as came under the 4th section of the Statute of Frauds, and that any agreement respecting it must be in writing. *Macdonell v. McKay*, 15 Grant, 391.

The owner of land gave parol authority to an agent to sell, the agent accordingly entered into a parol contract for the sale, and communicated the fact and the particulars of the contract to his principal by letter : *Held* a sufficient note or memorandum in writing to satisfy the Statute of Frauds. *McMillan v. Bentley*, 16 Grant, 387.

Acknowledgment of Bargain by a Will.

E, the agent of a testatrix, introduced into her will a clause declaring that she had sold to one *S* two properties therein described, and directing the plaintiff (to whom she devised all her real and personal estate beneficially), to convey these properties to *S*. The testatrix contracted with *S* for the sale to him of one only of these lots ; but *E* alleged a verbal bargain by the testatrix to sell the lot to him ; there was no writing as to such bargain, and no part performance. After the death of the testatrix, *E* induced the plaintiff, who was not of age, to execute a conveyance to *S* of the two lots : *Held*, that the alleged bargain with *E* was not binding on the plaintiff, and a release of the lot to her was directed, with costs to be paid by *E*. *Archer v. Scott*, 17 Grant, 247.

STATUTE OF LIMITATIONS.

See DEVISE—EASEMENT—EXECUTION, I. 7—PARTNERSHIP
—QUIETING TITLES, I. 2.

The Act 25th Victoria, chapter 20, abolishes all exceptions and distinctions in favour of absentees : therefore twenty years adverse user or occupation of land will bar the right of the party having the legal paper title, whether resident within or without the jurisdiction during such period of twenty years. *Low v. Morrison*, 14 Grant, 192.

An objection of the Statute of Limitations cannot be made by an appellaut against the Master's report, without having been taken before the Master. *Brigham v. Smith*, 18 Grant, 224.

To prove title by length of possession, the plaintiff shewed that a person under whom he claimed, had, at an early date, cleared part of the lot in question ; but there being no evidence that he did so under any claim of right, it was *held* that such clearing was not constructively a possession of the rest of the lot. *McMaster v. Morrison*, 14 Grant, 138.

The defence of the Statute of Limitations being allowed at the hearing to be put in by supplemental answer : *Held*, on rehearing, that the plaintiff should have an opportunity of controverting this defence. *McIntyre v. The Canada Co.*, 18 Grant, 367.

The defendant acquired the legal title under a deed in December, 1842, in the portion allotted to him of the land in which the plaintiff and defendant, as also one *M*, had previously been jointly interested ; and the strip of land in question in this suit was erroneously included in this conveyance ; and this fact was known, but the conveyance was executed notwithstanding. About the same time the plaintiff and defendant executed a document agreeing to leave this strip for their mutual benefit, the plaintiff to have the timber thereon. The defendant had not actual possession of the strip, but there was no separation between it and the other portion of the lot which he did occupy under his conveyance : *Held*, that this document operated to prevent the defendant from acquiring a title to this strip under the Statute. *Moffat v. Walker*, 15 Grant, 155.

The use of bracket boards on a mill dam is such an easement as the Statute of Limitations will protect. *Campbell v. Young*, 18 Grant, 97.

A person, who had been in possession of lands for upwards of 20 years, wrote to the heir of the true owner, acknowledging his title as such heir : *Held*, that such acknowledgment having been made after the title by possession was complete, did not take away the statutory right which possession gave. *McIntyre v. The Canada Co.*, 18 Grant, 367.

An acknowledgment to a party's trustee is sufficient to take a case out of the Statute of Limitations. *Ib.*

P, being in possession of land of which he was not the owner, made a verbal gift of the land to *C*, but afterwards ejected him. *C* then obtained a conveyance from the owner. More than 20 years had elapsed from the time that the Statute of Limitations began to run in favour of *P* against the true owner: *Held*, that *C*'s possession did not interrupt in *C*'s favour the running of the Statute; that the owner being barred, *C*, his grantee, was barred also. *Ib*.

The owner of land put his father in possession in 1847, under a parol agreement that the father should clear up and cultivate the land, taking to his benefit the profits thereof. The father remained in undisturbed possession until his death, which occurred in 1870: *Held*, that the father had obtained a title by length of possession; and a bill filed to obtain the delivery up of certain deeds executed between the father and another son was dismissed with costs. *Truesdell v. Cook*, 18 Grant, 532.

STAYING PROCEEDINGS.

See ARBITRATION.

Where former action pending.

Where a former action of ejectment had been brought and decided on the merits, and no real or probable cause of suit was sworn to in the suit moved in; an order was granted to stay proceedings until the costs of the action of ejectment were paid. *Ostrander v. Ostrander*, 3 Cham. R., 50.

Pending rehearing.

The Court will not, as a matter of course, stay proceedings pending a rehearing. It is in the discretion of the Court to stay, or refuse to stay, proceedings; and the Court will impose terms according to the circumstances of each case, granting a stay more readily than formerly, if it be shewn that there is a danger of loss unless proceedings be stayed.

Where in an interpleader suit a large sum of money was

ordered to be paid over to a claimant resident in the United States, and the plaintiff who purposed to rehear, and had made his deposit, asked to have proceedings stayed ; the claimant was directed to give security to abide by any order the Court might make upon the rehearing, and to repay the money if so directed, before the money was ordered to be paid to him. *Walker v. Niles*, 3 Cham. R., 418.

Pending appeal.

Security for the costs in appeal, as well as those of the Court below, will be required to be given before proceedings in Court below will be stayed, pending an appeal. *Heward v. Heward*, 2 Cham. R., 245.

The Church Society of the Diocese of Toronto had become united to, and incorporated with, the Synod of the Diocese by Act of Parliament. A bond for security for costs of appeal, &c., had been filed, and a motion made to allow such bond, which was objected to on the ground that such a bond could not be properly executed without the concurrence of at least one-fourth of the clergy of the Diocese, and unless at least one-fourth of the congregations were represented: *Held*, that the Synod was bound by what had been done by the proper officers of the former corporation without waiting for the action of the Synod, and that there was an implied authority in the Act, authorizing them to take such a proceeding as that in question, on behalf of, and in the name of, the Synod, and a stay of proceedings pending the appeal was granted. *Boulton v. Church Society*, 2 Cham. R., 377.

A motion to stay proceedings pending an appeal may properly be made, although no petition of appeal has yet been filed.

But the party applying for a stay must be in a position to appeal. When, therefore, a party seeking a stay, pending an appeal from an interlocutory order, applied ; when it had become too late to give notice and get in his appeal within six months, the application was refused. *Brigham v. Smith*, 3 Cham. R., 313.

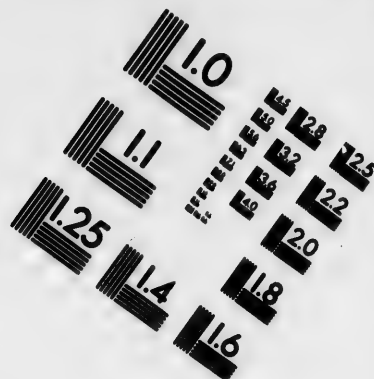
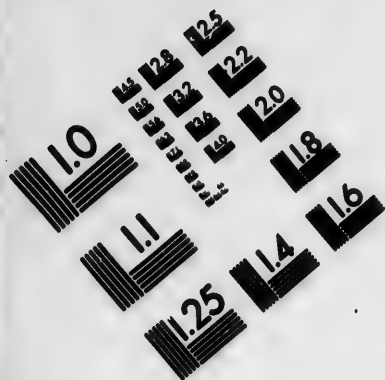
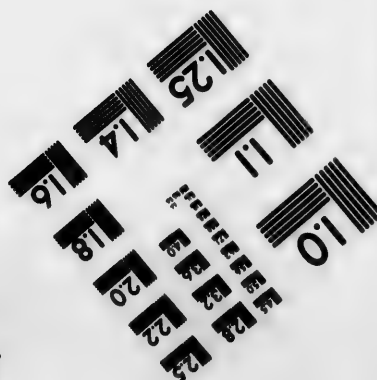
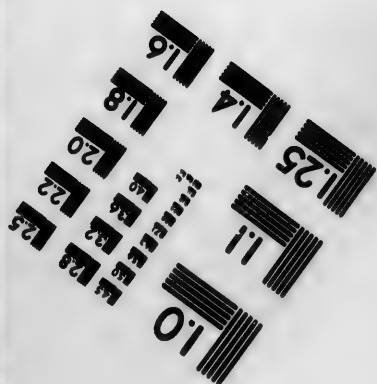
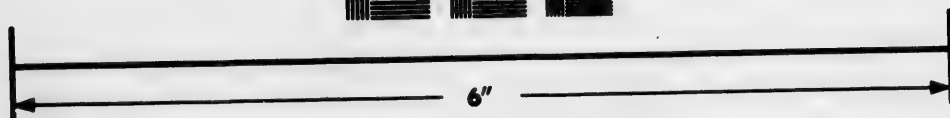
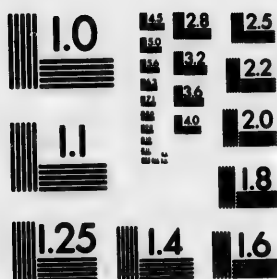


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An application to stay proceedings pending an appeal from an order overruling a demurrer, is to the discretion of the Court.

Where allowing plaintiff to proceed would so prejudice the defendant as virtually to defeat the appeal, proceedings will be stayed, but where defendant fails to shew that he would be prejudiced, a stay will be refused.

In a case where the stay moved for was refused, the Court ordered that any answer put in should be without prejudice to the appeal from the order overruling the demurrer. *McMurray v. The Grand Trunk Railway Company of Canada*, 3 Cham. R., 125.

Although the Court is averse to interfering with sales under decrees or orders of the Court, yet, where a sufficient case is made, it will nevertheless grant indulgence to a purchaser in aid of carrying out a sale previously made, and when a re-sale is about to take place.

Where a re-sale had been advertised and was about to take place, the purchaser, who was a devisee and had reason to expect to receive a balance from the estate, in which he was disappointed, and had been unable to carry out his purchase sooner, applied for a stay of the re-sale, he was let in to complete his purchase on payment of costs, and of the purchase money, into Court with subsequent interest, and of \$100 to cover his share of costs of second sale, and of the application. *Denison v. Denison*, 4 Cham. R., 37.

STOP ORDER.

The Court has no jurisdiction to grant a "stop order" at the instance of a judgment creditor of a party entitled to funds in Court. *Lee v. Bell*, 2 Cham. R., 114.

STYLE OF PROCEEDINGS.

A bond for security for costs in, should be styled in the Court of Error and Appeal.

The style of the cause in the Court below, if adopted, should be the style in full, and the parties should be described as they respectively become appellants or respondents, but to carry out the view of the Court, as intimated in *Harvey v. Smith* (2 E. & A. R., 480), they may be given in the same order as in the style of the original cause. *Weir v. Matheson*, 2 Cham. R., 73.

After a bill has been dismissed against one defendant, the style of cause as it originally was, should be continued. It is not necessary to omit the name of the defendant against whom the bill has been dismissed, and the retention of the name is not irregular.

Sed quære, would it be irregular if the name was omitted. *Upper Canada Mining Company v. Attorney-General*, 2 Cham. R., 185.

The proper style of proceedings in a matter of taxation is in the matter of the solicitor only, without the style of any cause. *Re Scott*, 3 Cham. R., 467.

It is sufficient in a notice of hearing to name in full the first plaintiff and first defendant: the words "and another," or "and others," after the name, are sufficient without naming the other or others. *Stevenson v. Hodder*, 15 Grant, 542.

The notice of setting down a demurrer for argument must contain the full style of cause. *Carroll v. McDonald*, 15 Grant, 329.

Affidavits styled in short form, "*A B* and others, plaintiffs," and "*C D* and others, defendants," were held to be sufficiently styled and allowed to be read. *Dickey v. Heron*, 2 Cham. R., 490; see also *Somerville v. Kerr*, 2 Cham. R., 155.

SUBMITTING TO DECREE.

Where the defendant submitted, by answer, to be redeemed on payment of costs, and made statements which, if true,

would have entitled him to costs: *Held*, that the plaintiff was justified in going to a hearing for the purpose of proving facts which entitled him to costs against the defendants. *Brand v. Martin*, 16 Grant, 566.

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SUBPŒNA.

A subpœna should be under the seal of the Court, not that of a Deputy Registrar.

Where a witness was served with a subpœna under the seal of a Deputy Registrar, it was held he was not bound to obey it. *Waddell v. McGinty*, 2 Cham. R., 445.

To compel the attendance of a witness, or a party whom it is sought to examine, he must be duly subpoenaed or served with an appointment eight days previous to an examination.

A subpœna should not be dated prior to the time at which the party taking out such subpœna is entitled to examine the party or witness served with subpœna.

Where a party plaintiff in a cause had been served with a subpœna dated before he was regularly liable to examination—a motion to commit him or dismiss his bill was refused, but without costs. *McMurray v. Grand Trunk Railway Company*, 3 Cham. R., 130.

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SUBSEQUENT INCUMBRANCERS.

Where, by his report made under a foreclosure decree, the Master appointed a time for all the subsequent incumbrancers, who proved before him, to redeem, the plaintiff, one of whom at the time appointed, paid the amount and took an assignment: *Held*, that the incumbrancers, who could not redeem, were entitled to three months' further time before the co-defendant could obtain a final foreclosure against them. *Ardagh v. Wilson*, 2 Cham. R., 70.

SUIT FOR TRIFLING AMOUNT.

See JURISDICTION.

The rule and policy of the Court is to discourage suits for trifling amounts, or brought vexatiously. Where, therefore, a bill was filed in respect of a sum not exceeding \$10, including interest, the Court at the hearing, without reference to the merits of the demand, dismissed the bill; but without costs, as the defendant ought, under the circumstances, either to have demurred, or moved to take the bill off the files. *Westbrooke v. Browett*, 17 Grant, 339.

SUMMARY JURISDICTION.

See SOLICITOR, I.

SUPERSTITIOUS USES.

A bequest by a member of the Roman Catholic Church of a sum of money for the purpose of paying for masses for his soul, is not void in this Province. *Elmsley v. Madden*, 18 Grant, 386.

SUPPLEMENTAL ANSWER.

See ANSWER PLEADING, I.—PARTIES, I. 11.

SUPPRESSION OF FACTS.

See QUIETING TITLES.

SWEARING ANSWER.

See PRACTICE.

TACKING.

Judgment against devisee.

A mortgagor's devisee held not entitled to redeem the mortgage without also paying a judgment held by the owner of the

mortgage against the mortgagor. This is not such tacking as the Registry Act forbids. *McLaren v. Fraser*, 17 Grant, 533

TAXATION.

See COSTS—MASTER'S OFFICE—SOLICITOR.

1. *Costs of, where party does not appear.*
2. *Adding an item.*
3. *Petition for, after a month.*
4. *No taxation a length of time after payment.*
5. *Infants.*
6. *Ex parte order.*
7. *Liability incident to Solicitorship.*
8. *Retaxation.*
9. *Bargain for higher fees.*
10. *Between Solicitor and Client.*

1. *Costs of taxation, where party does not appear.*

Held, that the Court had no discretion as to costs of taxation where party does not appear. *Re Kerr*, 2 Cham. R., 47.

2. *Adding an item.*

Leave to add an item granted, on payment of costs. *Re Crawford v. Crombie*, 2 Cham. R., 13.

3. *Petition for, after a month.*

Where a solicitor's bill has been delivered more than a month, and no action brought, he can not obtain an order to tax on *præcipe*, but must apply on petition. *Re Boulton*, 2 Cham. R., 58; see also *Stinson v. Martin*, 2 Cham. R., 86.

An application to tax costs should be on petition, and not by motion. *Bell v. Wright*, 2 Cham. R., 96.

4. *No taxation a length of time after payment, except on shewing special circumstances.*

In the absence of gross overcharge or pressure, the Court will not open up and tax a solicitor's bill which has been ren-

dered several years, and treated as paid, the solicitor having abandoned any excess over certain sums received by him. *Re Thompson*, 2 Cham. R., 100.

A petitioner seeking to tax a bill of costs rendered over a year, must allege and establish items of overcharge, and shew special circumstances why taxation should be permitted. In *re Malcolm Cameron*, 2 Cham. R., 311.

5. *Infants.*

Where executors have appealed, infants in the same interest need not appear, and will not be allowed costs if they do. In such case, the guardian was allowed only an attending fee without brief. *McLaren v. Coombs*, 2 Cham. R., 124.

6. *Ex parte order irregular.*

Where an order for taxation had been obtained *ex parte* at the instance of one of two clients, who had jointly retained the solicitors, whose bill it was sought to tax, such order was set aside as irregularly obtained. *Re Beecher, Barker and Street*, 2 Cham. R., 215.

An order to tax a solicitor's bill is not to be granted *ex parte* on the application of the solicitor where there appear to be any facts in dispute between him and the client. It is the duty of the solicitor applying to make known such facts to the Court, and if he does not the order will be set aside.

Motions for taxation under such circumstances should be on notice, and the reference should as a rule be to the Master at Toronto, although in special cases such rule may be departed from. *Re Fitch*, 2 Cham R., 288.

7. *Liability incident to Solicitorship.*

On a motion to tax costs, a solicitor was liable for moneys which had come to his hands, and that he can be called on to account under a summary order, although the transaction may be one which, were the party not a solicitor, would be an ordinary case of principal and agent. *Re Walker*, 2 Cham. R., 324.

8. *Retaxation.*

A retaxation of a solicitor's bill will not be ordered unless improper charges are specified and established. *Eastman v. Eastman*, 2 Cham. R., 325.

A party is not entitled to the delivery of any bill he is not entitled to have taxed; and where a bill has been taxed, it will not again be referred, even with other or subsequent costs, except on proof of special circumstances.

9. *Bargain for higher fees than tariff provides.*

No bargain between a solicitor and client whereby the latter undertakes to pay more than the recognized fees for the work to be done, can be enforced.

Where a solicitor's Toronto agent made a bargain with the client for two dollars an hour, such bargain was held not to be binding, although looked upon to be reasonable, the sufficiency or insufficiency of the amount not being held to affect the question where the item is fixed by tariff. *Re Geddes & Wilson*, 2 Cham. R., 447.

10. *Practice on, Solicitor and Client.*

If charges on a solicitor's bill of costs are unusual or exceptional, he has to make out a very clear case to have them allowed.

If the usual charges are made, but the client complains of negligence or unskilfulness not apparent on the face of the bill, then the *onus* rests on him to establish his case. In *re A. B., a Solicitor*, 7 U. C. L. J. 21, 4 Cham. R.

Where an order was applied for for the taxation of costs incurred in suits in Court of Common Pleas, the County Court, and Division Court, according to the terms of an alleged agreement as to rate of remuneration, an order was granted with a direction to the Master to ascertain whether any valid agreement existed between the parties. *Re Wetenhall*, 4 Cham. R., 98.

The practice defined as to the manner in which the Master will tax Solicitor's costs for services in the sale of lands and collection and transmission of the purchase money. *Re Richardson*, 3 Cham. R., 144.

TAXES.

See QUIETING TITLES—SALE—TAX SALES—PLEADING.

The devisee of a life estate in all a testator's property is bound to keep down the annual taxes on the land, and they form a first charge on the devisee's interest. *Gray v. Hatch*, 18 Grant, 72.

By the Assessment Act of 1866, owners had four years to impeach a tax deed: by an Act passed in 1869, all actions for that purpose were stayed until after the following session of the Legislature; and by another Act of the same session all previous Assessment Acts were repealed, amended, and consolidated, with a reservation of rights had or acquired under the repealed Acts; by one of the clauses of the amended Act the limit for bringing actions was two years: *Held*, that an owner, who had less than two years of his four remaining when the Acts of 1869 were passed, had like others two years thereafter to bring his suit. *Connor v. McPherson*, 18 Grant, 607.

TAX SALES AND TAX TITLES.

See QUIETING TITLES, 14—TITLES, 5.

1. *Parties, &c.*
2. *Mortgage—Redemption.*
3. *Restraining Ejectment.*
4. *Fraud—Relief against forfeiture.*
5. *Advertisement.*
6. *Where void for uncertainty.*
7. *For more than due.*
8. *Miscellaneous decisions.*

1. *Parties.*

After a sale of land for taxes for 1859 and following years,

a subsequent sale for the taxes of 1858 was held invalid, and the purchaser under the first sale was held entitled to retain the land free from past taxes.

A municipal officer charged with some irregularities in the performance of his duty, but not guilty of any fraud or intentional wrong, is an improper party to a bill to set aside a tax-sale on the ground of such irregularities. *Mills v. McKay*, 15 Grant, 192.

2. *Mortgage—Redemption.*

The five years for which lands are to be in arrear for taxes, before they are liable to be sold, must be before the delivery of the Treasurer's warrant to the Sheriff.

Land having been sold for taxes, a party interested therein as mortgagee applied to the vendee of the Sheriff to be allowed to purchase, on the ground of his having an interest in the land, and which he was permitted to do, his only interest in the land being as mortgagee.

Held, that the purchaser could not afterwards set up this title in opposition to the mortgagor's claim to redeem.

Although a mortgagee may, as well as a stranger, purchase lands of which he is mortgagee, still, if he purchases as mortgagee, and makes his interest in the land a ground for being allowed to purchase, he cannot afterwards set up the title thus obtained against the mortgagor's right to redeem. *Kelly v. Macklem*, 14 Grant, 29.

3. *Restraining ejectment.*

Where an action of ejectment had been brought by the purchaser of lands alleged to have been illegally sold for taxes, the Court declined to interfere by injunction to restrain the action. The proper course in such a case, in the event of the sale being found invalid, is for the owner to tender a deed to the purchaser for execution, and on his refusal to execute such a deed, to apply to this Court for relief. *Bamberger v. McKay*, 15 Grant, 328.

4. *Fraud—Relief against forfeiture.*

In case of a tax sale, if the owner, instead of paying the redemption money to the County Treasurer for the Sheriff's vendee, pays it to the latter personally, and he accepts it, the payment is in equity as effectual to save the property as payment to the Treasurer would have been. So, if the Sheriff's vendee verbally agrees to accept payment personally at a distance from the county town, in lieu of its being made to the Treasurer for him, and the owner acts on this agreement, the other cannot afterwards to the owner's prejudice require the money to be paid for him to the Treasurer, or refuse to receive it himself, when it is too late to pay the Treasurer, and insist on holding the land as forfeited.

Where such an agreement was proved by a credible witness, but there was contradictory evidence as to whether what took place amounted to an agreement, the Court, holding that the presumption in a case of doubt must be in favour of fair dealing and not of forfeiture, gave the owner relief. *Cameron v. Barnhart*, 14 Grant, 661.

5. *Advertisement.*

Where a tax sale was advertised in the *Canada Gazette* for thirteen successive weeks before sale, but such thirteen weeks did not amount to three calendar months from the date of the first publication, it was held that the irregularity did not invalidate the sale. *Connor v. Douglas* (In Appeal), 15 Grant, 456.

6. *Where void for uncertainty.*

Where there were two lots on a particular street with the same number, one on the south side, and one on the north side, and neither the assessment nor the Sheriff's deed on a tax sale thereof distinguished the one from the other: the sale was held void for the uncertainty. *Lount v. Walkington*, 15 Grant, 332.

7. *For more than due.*

A tax sale for more than was due is not rendered valid by 27 Vic., c. 29, s. 4.

Where two half lots were assessed separately, a sale of the whole lot for the total amount was *held* to be invalid, notwithstanding that Statute. *Yokham v. Hall*, 15 Grant, 335.

8. *Miscellaneous decisions.*

Where the Court is called upon to set aside a tax sale which is equally void at law and in equity, the Court does so, if at all, only on such terms as are equitable. *Paul v. Ferguson*, 14 Grant, 230.

On a bill impeaching a tax sale on the ground that no portion of the taxes had been due for five years before the issuing of the treasurer's warrant, it appeared that the first year's taxes had been imposed by a by-law passed in July, 1852; that the collector's roll was not delivered until after August, 1852; and that the treasurer's warrant was dated 10th July, 1857: *Held*, that the sale was invalid. *Connor v. McPherson*, 18 Grant, 607.

The warrant for the sale of land for taxes described the lands as "all deeded:" *Held*, sufficient. *Cook v. Jones*, 17 Grant, 488.

The statutory provision requiring certain rates to be kept separate on the collector's roll is directory only; and where the direction had not been observed, a sale for non-payment of the taxes was held valid notwithstanding. *Ib.*

In a suit to impeach a sale of land for taxes, it appeared that about 20 acres of the lot were cleared and a barn was erected thereon, into which hay, made on these 20 acres by a person occupying the adjoining lot, was stored in winter, no one residing on the 20 acres; the owner being resident out of the county, and never having given notice to the assessor of the township to have his name inserted on the roll of the township: *Held*, that this was not such an occupancy of the 20 acres as exempted the lot from being assessed as the land of a non-resident. *Bank of Toronto v. Fanning*, 17 Grant, 514.

[See this case on Appeal.]

Held, per Richards, C. J., Wilson, J., Mowat, V.-C., Galt, J.,

and *Strong, V.-C.*, that the Statute 27 Victoria, chapter 19, section 4, cures all errors as regards the purchaser at a tax sale, if any taxes in respect of the land sold had been in arrear for five years ; this rule applies where an occupied lot has been assessed as unoccupied. *The Bank of Toronto v. Fanning* (In Appeal), 18 Grant, 391.

In a suit to impeach a sale of land for taxes, it appeared that about 20 or 30 acres of the lot were cleared and fenced, and a barn was erected thereon, into which hay made on these twenty acres were stored in winter, by the person occupying the adjoining lot under the authority of the proprietor ; no one resided on the 20 acres ; the owner was resident out of the country, and had not given notice to the assessor of the township to have his name inserted on the roll of the township :

Semle, that the lot should have been assessed as occupied. *Ib.*

[*Draper, C. J., Hagarty, C. J., and Gwynne, J.*, dissenting, who were of opinion that the lot was properly assessed as non-resident.] *Ib.*

The Act 32 Vic., ch. 35, respecting lands sold for arrears of taxes, applies only to cases in which the validity of a tax sale is called in question.

If a plaintiff claims land by two titles, one only of which involves any question as to the validity of a tax sale, he may proceed as to the other branch of his case. *Cameron v. Barnhart*, 2 Cham. R., 346.

TECHNICAL GROUNDS.

Technical objection.

Where a party seeks to set aside a proceeding on technical grounds, his own case will be judged *strictissime juris* ; and if he moves on insufficient materials, he does so at his own risk, and the Court will not aid him.

The Court will not encourage the taking advantage of an

error which is obviously a mere slip and does not mislead, and is not calculated to mislead. *Scott v. Burnham*, 3 Cham. R., 399.

TENANT IN COMMON.

See INJUNCTION II.—8.

Contribution by, to pay costs of suit to stay waste.

Where costs were incurred by a tenant in common, suing on behalf of himself and his co-tenants, in restraining the committing of waste on the joint property by a stranger, it was held, that, on its being shewn that the suit was necessary and proper, and that it resulted in benefit to the co-owners, they should share the expense, in proportion to the advantage they had derived from the suit. *Gage v. Mulholland*, 16 Grant, 145.

TENDER.

A tender held sufficient, though money not actually produced. *Long v. Long*, 17 Grant, 251.

In equity a tender by a mortgagor stops interest, unless the mortgagee shews that the money was afterwards used by the mortgagor, and a profit made of it; the *onus* of proof as to such use is on the mortgagee; but on his giving such proof, the subsequent interest is chargeable. *Knapp v. Bower*, 17 Grant, 695.

Where defendant had neglected to furnish a statement of amount due, the plaintiff was exonerated from making a tender. *Sweeney v. Kay*, 15 Grant, 432.

THIRD PERSON.

Suit by.

Land having been conveyed in consideration of the grantee's agreeing to convey a certain portion to a third person who was no party to the transaction, it was held that this person could maintain a suit in his own name for such portion. *Shaw v. Shaw*, 17 Grant, 282.

TIMBER.

See DOWER, III. 6.

A testator devised his farm to minor children, and directed that his executors should rent the same ; that no timber should be cut except for the use of the premises ; and that the executors should have full power to carry the will into effect : *Held*, that it was the duty of the executors to prevent the executrix from cutting the timber for other purposes. *Stewart v. Fletcher*, 18 Grant, 21.

TIMBER LIMITS.

The plaintiff, being entitled, according to the usage of the Crown, to a license for certain timber limits, on the 3rd December, 1863, took out a license in the name *J. N. & Co.*, and delivered the same to them upon a verbal agreement for obtaining advances on the security thereof ; *J. N. & Co.* procured these advances from a bank, and deposited the license by way of security. In December, 1864, the plaintiff took out a new license in the name of *J. N. & Co.*, and they assigned the same to the bank as a further security. The plaintiff having made default, the bank sold the limits with the knowledge of, and without any objection by, the plaintiff : *Held*, in appeal, that though there was no writing shewing the agreement between the plaintiff and any of the other parties, the sale was binding on him ; and a bill impeaching it was dismissed with costs. [*Draper, C. J.*, and *Spragge, C.*, dissenting.] *McDonald v. McKay*, 18 Grant, 98.

TIME.

1. *Computation of, &c.*
2. *For moving against an order.*
3. *Essence of contract.*
4. *For appealing*—See APPEALING.
5. *For setting up Statute of Limitations.*

1. *Computation of time*—General Order 163—*Setting down cause.*

In computing the time for setting down a cause, the day on

which it is set down and the first day of hearing are both excluded. There should fourteen clear days intervene. *Beard v. Gray*, 3 Cham. R., 104.

2. *For moving against an order.*

Motion before a Judge to set aside an order to revive was held to be too late after the lapse of fourteen days.

But under the circumstances the Court granted an enlargement of the time. *McIlroy v. Hawke*, 3 Cham. R., 66.

3. *Essence of contract.*

Where lands which have a fluctuating value are the subject of a contract, time is, from the nature of the case, of the essence of the contract. *Sanderson v. Burdett*, 16 Grant, 119.

4. *For appealing.*

The Court will, in the interests of justice, exercise a liberal discretion in extending the time for appealing or reinvestigating a title, where any error is alleged to exist; and under the circumstances, it appearing that the contestants had been somewhat misled as to a separate piece of land to which they supposed no claim to be asserted, the Court granted an application for a reinvestigation of the title after the time for appealing had expired, on payment of costs. *Re Howland*, 4 Cham. R.

An order of Court dismissing an appeal from the Master, was held to be an interlocutory order, and it was held that an appeal against the same should have been brought up within six months. *Borigham v. Smith*, 3 Cham. R., 313.

5. *For setting up Statute of Limitations.*

The Court will not relieve a party against the effect of one lapse of time in order to enable him to set up another lapse of time against creditors. Where, therefore, a party applied for leave to appeal after the time for appealing [or for giving notice thereof] had expired, in order to enable him to set up the Statute of Limitations against certain creditors' claims, the Court refused the application. *Ib.*

The fourteen days in which a party must bring on an appeal from an order made in Chambers, count from the entering of the order, not from its date. *Harvey v. Boomer*, 3 Cham. R., 11.

TITLE.

See QUIETING TITLE.

1. *Legal title—Cloud on title.*
2. *Making a title where heirs are minors.*
3. *Missing title deeds.*
4. *By possession.* See QUIETING TITLES.
5. *Assignment for benefit of creditors.*
6. *Title deeds.*
7. *Purchase under order in Chancery.*

1. *Legal title—Cloud on title.*

Persons having a legal title to land of which defendants had been in possession for many years, were *held* not entitled, before establishing their right at law, to set aside, in equity, as clouds on their title, instruments to which they were not parties, under which they made no claim, and which they did not allege to be fraudulent. *McGregor v. Robertson*, 15 Grant, 543.

2. *Making a title where heirs are minors.*

Where the heirs are minors, the Court will make an order vesting the estate. *Donaldson v. Berry*, 2 Cham. R., 16.

3. *Missing Title Deeds.*

Where there was no other proof of the execution of a conveyance which constituted a link in the chain of title, than a memorial purporting to be executed by the grantee in such conveyance, the Court refused to force the title upon a purchaser. *Wishart v. Cook*, 15 Grant, 237.

4. *Possession.*

In order to make a good title by possession, it must be shown

that the *whole* of the land has been actually cleared or occupied for a period of at least 20 years. *Ib.*

A title by possession can only be made to so much of a parcel of land as has been actually cleared or occupied for 20 years. *Ib.*

5. *Assignment for benefit of creditors.*

Where a deed had been made in trust for creditors to a party who afterwards re-conveyed to the grantor, some of whose creditors had been informed of such assignment having been made, but had done no act to alter their position in any way, and the land was afterwards sold for taxes; it was *held*, that the deed of assignment was revoked, and did not affect the title. *Spooner v. Jones*, 3 Cham. R., 481.

6. *Title-deeds.*

The mortgagor, after foreclosure, having retained the title deeds, delivered them to a third party to whom he had sold, whose solicitor claimed a lien as against such third party, and declined to deliver them to the mortgagee; on a motion for that purpose, an order was made for their delivery. *Stennett v. Aruyn*, 2 Cham. R., 218.

7. *Purchase under Order in Chancery.*

On a sale by a person whose title is derived under a Chancery purchase, a question as to whether the legal estate was effectually conveyed to him under such purchase is, on a subsequent sale of the property, a question of conveyance, not of title. *Rae v. Geddes*, 18 Grant, 217.

TRADE MARK.

See INJUNCTION, I. 8.

A cigar manufacturer, to distinguish his cigars from others, called them "Cable Cigars," and afterwards adopted a method of stamping on each cigar, in bronze, an elliptical figure, with

the name "S. DAVIS," and the word "CABLE" within the same. A rival firm, two years afterwards, adopted the same method, using for the purpose a trade-mark identical with this, except that they substituted their initials, "C. P. R. & C." for the other's name, and the word "CIGAR" for the word "CABLE." It was proved that persons had bought these cigars supposing them to be the cable-stamped cigars : *Held*, that the manufacturer of the cable cigars was entitled to an injunction to restrain the other parties from using the trade-mark which they had so adopted. *Davis v. Reid*, 17 Grant, 69.

TRANSMITTING ANSWER.

Where an answer had been irregularly transmitted, it was ordered to be re-sworn within a given time, with costs, against the defendant. *Gordon v. Johnson*, 2 Cham. R., 205.

TREASURER.

County Treasurer, duty of.

A County Treasurer should keep the county money deposited to a separate account, and should not allow it to be unnecessarily mixed up with his own private moneys. *Peers v. Oxford*, 17 Grant, 472.

TRUSTS ACT.

See ACTS--JUDICIAL OPINION.

Under the Statute 29 Vic., sec. 58, to amend the law of property and trusts, the Court made an order approving of a proposed sale to a partner of an intestate, of an intestate's interest in the partnership assets. *Ex parte Sessions*, 2 Cham. R., 360.

TRUST AND LOAN COMPANY.

See ACTS.

TRUST ESTATE.

Quieting Titles Act—Notice—Evidence, &c.—Trust estate.

Whether trust estates escheat, &c., considered. *Re Adams*,
4 Cham. R., 29.

TRUSTS, TRUSTEE, AND CESTUI QUE TRUST.

See INFANTS' MORTGAGE—PRINCIPAL AND AGENT—PRINCIPAL AND SURETY.

1. *Trustee and cestui qui trust.*
2. *Trustee for sale.*
3. *Payment for improvements.*
4. *Laches.*
5. *Transactions between mother-in-law and sons-in-law.*
6. *Trust proved by parol.* See PAROL EVIDENCE.
7. *Parol trust.*
8. *Trust fund misapplied by one trustee.*
9. *Advances to trustees.*
10. *Trustee for creditors.*
 - (a) *Compounding debt.*
11. *Liability for acts of agents.*
12. *Compensation.*
13. *Priorities.*
14. *Interest on investment, &c.*
15. *Assignment of decree.*

1. *Trustee and cestui que trust.*

Money was recovered by the administratrix of a person killed by a railway accident, and the shares allotted to her children were deposited by her with her brother, who was fully cognizant where the money came from, and to whom it belonged: *Held*, that he was liable to account to the children as their trustee. *Secord v. Costello*, 17 Grant, 328.

L The administratrix was afterwards sued by her brother for a debt alleged to have been due by her husband, and judgment

was recovered by him in the action, and subsequently a reference was made to arbitration in respect of other moneys come to the hands of the administratrix for the benefit of her children, and by her deposited with her brother, and this judgment and the amount due thereon were, at the arbitration, mixed up with questions as to these trust moneys, and the award was in respect of all. The parties all acted as if these trust moneys and the debts of the estate were to be considered and dealt with together; but the infants were not represented before the arbitrators: *Held*, that the infants were not bound by the award made under such circumstances. *lb*.

Where a trustee is authorized to invest in either of two specified modes, and by mistake invests in neither, the measure of his liability is the loss arising from his not having invested in the less beneficial of the authorized modes. *Paterson v. Lailey*, 18 Grant, 13.

Two years before the passing of the Act relaxing the usury laws (22 Vic., c. 85), a trustee who was authorized to invest on mortgage or in Government securities, made an investment in Upper Canada Bank stock, under the impression that such an investment was within his authority. The stock ultimately turned out worthless; and the trustee submitted to account for the principal with compound interest at six per cent.: *Held*, that this was the extent of his liability, though eight per cent. might have been obtained on mortgages. *lb*.

The insolvency of a trustee, or his leaving the country in debt to reside in a foreign country, is a sufficient ground to remove him from the trust. *Gray v. Hatch*, 18 Grant, 72.

By virtue of a will, *A* had a life interest in certain lands, with remainder to the plaintiff in fee. The land was afterwards sold at Sheriff's sale under circumstances which made the sale void in equity, and the purchaser a trustee for the devisees. *A* (the life-tenant) for valuable consideration conveyed his life-interest to the purchaser: *Held*, that the plaintiff could not claim the benefit of that transaction. *Gilpin v. West*, 18 Grant, 228.

It is the duty of a trustee for sale to use all diligence to obtain the best price ; and where a trustee sold property at private sale, without previous advertisement, at a price lower than other persons were willing to give, and did not first communicate with these persons, though informed of offers of the higher price made by them to one of the *cestuis que trust* ; the trustee was held responsible for the loss. *Graham v. Yeomans*, 18 Grant, 238.

In such a case, the absence of any fraudulent motive in the trustee is no defence ; nor is evidence of witnesses that the property was worth no more than the trustee obtained for it. *Ib.*

The trustee deposed that he had disbelieved the statement of the *cestuis que trust* : *Held*, no excuse for not testing the truth of the statement by reference to the parties. *Ib.*

Where a judgment debtor had suffered a judgment to be taken, and execution to be issued against his goods, in a suit which he had himself caused to be brought by a party as trustee for his wife, under the assumption that she was beneficially entitled to claim certain money come to his hands from the estate of her father, which in fact, however, she was not, but a third person, her mother was equitably entitled ; on an application at the instance of a judgment creditor that a co-defendant with the judgment debtor should be directed to file a bill to impeach the judgment so obtained by the wife's trustee, the Court refused to interfere, holding that there was sufficient doubt of the impeachability of the judgment to induce the Court to refrain from directing a bill to be filed, but left the party entitled to the equity to take proceedings on her own responsibility. The application was, under the circumstances, refused with costs.

When a security intended to be given for the benefit of one supposed to be equitably entitled, although in preference to another creditor, and which would itself be unimpeachable, has been given by mistake to a wrong person, and that person the wife of the grantor, the transaction, although the grantee had been apparently influenced by motives of personal advantage,

was held not necessarily to be impeachable. *Grainger v. Latham*, 2 Cham. R., 419.

Where a cause is against the representatives of a deceased trustee, who had been defendant, the Court will exercise a greater degree of indulgence in the reception of new evidence than if the suit was against the original defendant. *Small v. Eccles*, 2 Cham. R., 97.

2. *Trustee for sale.*

The title of a trustee for sale being liable to be impeached by creditors of a former owner, the former owner being also entitled to the residue under the trust, the trustee bought at a discount a judgment recovered against such former owner. The trustee was at the same time a debtor to the trust in a sum greatly exceeding the amount paid for the judgment: *Held*, that he could not retain the profit on the purchase, and that his *cestuis que trust* were entitled to it.

After his purchase the trustee assigned the judgment: *Held*, that his assignee took subject to the same equities as affected himself. *Hewson v. Smith*, 17 Grant, 407.

3. *Payment for improvements.*

Where trustees with power of sale had in good faith, but erroneously, made a conveyance of a portion of the trust estate to one of the *cestuis que trust*, for the collateral advantage to the whole property to be derived from certain buildings and improvements to be made on the part conveyed thereon, thus committing a technical breach of trust; upon discovering which the grantee joined with the trustees in a conveyance of the whole trust estate for value, upon an agreement entered into between the parties that he should be paid such sum in respect of his improvements as the Court might consider him entitled to, and thereupon filed a bill for that purpose. The Court, under the circumstances, directed the grantee to be allowed such sum as it should be made to appear the improvements had enhanced the value of the whole property, or the price of the buildings and other improvements made thereon, whichever

should be the lesser in amount, and referred it to the Master to ascertain the amount ; although the rule is that, in such cases, payment for improvements will not be allowed at the instance of the party making them. *Pegley v. Woods*, 14 Grant, 47.

4. *Relief against Trustee, notwithstanding laches.*

The plaintiff, a squatter on Crown lands, made an assignment thereof to the defendant to enable him to obtain the patent for the plaintiff. There was no writing shewing the trust, and the defendant procured the patent to be issued in his own name, and thereupon the defendant induced the plaintiff to release his interest in the estate for less than half its value. There was great inequality between the parties in respect of their business capacity and otherwise ; and the defendant failed to shew that he had given the plaintiff all the information he was entitled to, or that the plaintiff had made the assignment without pressure and influence.

The Court *held*, that the plaintiff was entitled to redeem, on payment of the amount of the defendant's advances, although seven years had elapsed before the plaintiff had filed his bill impeaching the transaction ; the excuse assigned for the delay being his poverty ; it appearing that the parties could be restored to their original positions without loss to the defendants. *Brady v. Keenan*, 14 Grant, 214.

5. *Transaction between Mother-in-law and Sons-in-law.*

A widow of uncommon vigour of mind and strength of character, accustomed for many years to manage all her own affairs, and who owned property to the value of at least £25,000, incurred liabilities to the extent of £8,000 ; and the time of her indebtedness being one of great commercial depression, she could not raise money to pay, and was in danger of losing all she had by a forced sale ; she had two sons-in-law who were persons of wealth and credit ; her solicitor, without any communication with them, advised her to offer her property to them on terms which would make it worth their while to devote their time and energy to save a surplus for themselves ;

she, after some days' deliberation, adopted this advice, and proposed to them that they should take all her property, except two farms with which she wished to provide for the only two members of her family, besides the wives of the two sons-in-law, who had not already had large sums from her ; and the consideration which she proposed to the two sons-in-law was, that they should pay her liabilities and pay to herself an annuity : they with some reluctance accepted her proposal : the same was afterwards duly carried out, and she lived for seven years without making any objection to the transaction, though she was aware that they had made a considerable profit out of it. After her death, some of her heirs having filed a bill impeaching the transaction on the grounds of fraud and trust, the bill was dismissed with costs. *Wallis v. Andrews*, 16 Grant, 624.

6. *Trust proved by parol.*

A lot of land was purchased by the defendant in his own name, and he gave a mortgage for the purchase money. The bill alleged that *D*, through whom the plaintiffs claimed, was the real purchaser, and that the defendant was his agent and trustee in the matter. Part of the purchase had been paid with *D*'s money, and he had possession of the property for many years, and until his death : the trust which was denied was proved by parol ; and the Court decreed the plaintiffs entitled to the property, subject to a charge for any sums paid by the defendant on account of the purchase money, or for taxes. *Denny v. Lithgow*, 16 Grant, 619.

The plaintiff claimed as belonging to him a mortgage which was in the defendant's name, and had been given for the purchase money of the mortgaged land : the plaintiff had been in the Insolvent Court at one time after the transaction, and had sworn that he had parted with his interest in the property to the defendant in satisfaction of a debt : *Held*, that though there was some (not satisfactory) evidence in favour of the plaintiff's present claim, it was not sufficient against this sworn statement of his own. *Ross v. Ross*, 16 Grant, 647.

7. *Parol trust.*

A man conveyed land absolutely on a parol trust, and the trustee made a large advance on account of the grantor and his family; they afterwards settled accounts, and it was agreed between the two that the grantee should retain a portion of the land conveyed at a specified price in satisfaction of the balance due to him; mutual releases were executed, and the relation of the parties terminated. After the death of the grantee the grantor's wife and children filed a bill alleging that the land so retained was held in trust for them; but the Court being satisfied from the whole evidence that this was not so, dismissed the bill. *Hervey v. Boomer*, 17 Grant, 558.

Where a party claimed on the ground of a parol trust to be entitled to a conveyance of land from the heirs of the legal owner, and they required him to establish the trust by a suit, which he did: *Held*, that he was not entitled under the circumstances to the costs of the suit. *English v. English*, 15 Grant, 330.

8. *Trust Fund misapplied by one trustee.*

Trust funds which stood in the names of two trustees (*A* and *B*) were paid out on the cheques of the two; got into the hands of one (*A*) who was the acting trustee, and were misapplied by him without the knowledge of the other trustee (*B*). The primary *cestui que trust* was a married woman; the trust deed contained a clause in restraint of anticipation; there was a trust over with a limited power of appointment. *B* insisted that he was not liable, as he had become trustee at the request of the lady and her husband, and it had been represented to him that his name only was wanted; that his co-trustee (*A*) was to do the business part of the trust, and that he *B* was to have no trouble about it: *Held*, that these representations did not exempt *B* from the duty of seeing that the trust money was properly applied. *Mickleburgh v. Parker*, 17 Grant, 503.

9. *Advances to Trustees*

A party making advances to trustees for the benefit of a trust estate, and which advances are applied to the purposes of the trust, is entitled to stand *pro tanto* in the place of the trustees as against the trust estate. *Mills v. Cottle*, 17 Grant, 335.

10. *Trustee for Creditors.*

In a suit by a creditor of a deceased debtor who had made an assignment for the benefit of his creditors, certain other creditors who had not signed or accepted the deed of trust sought to come in under the decree. The trust deed had been made in 1857. The assignor had died in 1863; the assignment was to be executed by the creditors within two months of its date. The accountant declined to receive proof of the claims, and an application in Chamber for leave to come in and sign the deed and participate in benefit was refused. *Schreiber v. Fraser*, 2 Cham. R., 271

Where a debtor assigned his estate to trustees on trust to sell for the benefit of creditors; and the trustees were guilty of delay in selling and of other misconduct, it was *held*, that the Court had jurisdiction at the suit of a creditor to execute the trusts of the deed. *The Quebec Bank v. Snure*, 16 Grant, 681.

A trust was created for the benefit of creditors *pro rata*, in consideration of their discharging the debtor; all the creditors except the plaintiffs accepted from two creditors, who had become responsible for the fidelity of the trustee, twenty-five per cent. of their demands, in full; the estate yielded more: *Held*, that the plaintiffs had no right to the difference.

(a) *Compounding debts.*

Trustees accepted \$250 in discharge of a debt of \$300, and gave no evidence to explain the reason of this: *Held*, that, in the absence of such evidence, the Master was right in charging the trustees with the loss. *Baldwin v. Thomas*, 15 Grant, 119.

11. *Liability for acts of agents, &c.*

A trustee is bound to exercise a prudent supervision over the acts of an agent, or a co-trustee appointed or acting as agent or

manager, for his co-trustee ; and where he neglects this duty he makes himself liable for losses occurring through the acts of such agent or manager.

But a trustee in this position was not held liable for moneys received by the agent or co-trustee acting as manager, which were not entered on the books (to which the trustee charged had access), and which he could not have discovered by any vigilance he might have used.

A trustee is liable for the acts of an agent in whose appointment he has concurred, and whose defalcations would have been discovered by an ordinary inspection of the books kept by him. *City Bank v. Maulson*, 3 Cham. R., 334.

12. Compensation.

Where compensation was given to trustees by the trust deed, not in a lump sum, and they had failed in some points of their duty, the Master did not consider that he could deprive them of compensation, but *held* that he could determine on the value of the work done, and make a corresponding allowance. *City Bank v. Maulson*, 3 Cham. R., 334.

A commission should not in general be allowed to an executor or a trustee in respect of sums which he did not receive, but is charged with on the ground of wilful default. *Bald v. Thompson*, 17 Grant, 154.

The rule of the Court is to allow compensation to trustees of real estate under a will, as well as to executors.—*Ib.*

The old rule as to the compensation of trustees has only been abrogated by the Surrogate Act so far as relates to trusts under wills. *Wilson v. Proudfoot*, 15 Grant, 103.

Where a suit for the administration of an estate is pending in this Court, it is improper for the Surrogate Judge to interfere, by ordering the allowance of a commission to trustees or executors. *Cameron v. Pethune*, 15 Grant, 486.

13. Priorities.

Where a decree by mistake gave a trustee priority, in respect of a debt due to him by the estate, over claims of certain parties who were entitled to priority over the trustees: *Held*, on an application to correct the error, that an assignment for value, executed by the trustee after the decree, was no answer to the application, and that the assignee took subject to all the equities to which the trustee himself was subject. *Wood v. Brett*, 14 Grant, 72.

14. *Interest on investment.*

Mortgages, reserving 6 per cent. interest, were taken by trustees before the abolition of the Usury Laws, and were not called in for several years after the change of the law, but as it did not appear they were aware of an opportunity of investing at a higher rate, the Court refused to charge them with more than was reserved by the mortgages. *Cameron v. Bethune*, 15 Grant, 486.

Interest held to be allowable, on a preferred debt consisting of drafts and promissory notes from the date until paid and pending suit. *City Bank v. Maulson*, 3 Cham. R., 334.

15. *Assignment of decree.*

Trustees made payments to one class of creditors, over whom another class of creditors were entitled to priority, without first paying, or retaining sufficient to pay, the prior class; and a suit for the administration of the trust estate having been instituted, the creditors who had received such payments were ordered to repay what they had erroneously received, and the unpaid creditors were held entitled to a lien on the trust funds in Court in priority to the claims of the trustees, and all subsequent creditors, for debts and costs. *Wood v. Brett*, 14 Grant, 72.

ULTRA VIRES.

An arrangement with the plaintiff such as was customary in carrying out objects like those defined in a company's incorporation Act, and as was conducive to the attainment of those

objects, having been duly carried out : *Held*, that the arrangement could not afterwards be declared to have been beyond the powers of the company or its directors, so as to entitle the company to keep for their own use, without compensation to the plaintiff, the whole benefit which the arrangement had afforded the company. *McDonald v. The Upper Canada Mining Co.*, 14 Grant, 179.

UNDUE INFLUENCE.

See DEED, II.

Guardian and ward.

An infant entitled to real estate was brought up principally in the family of her uncle, from the age of eleven months until her marriage after attaining majority. Previous to her attaining twenty-one the uncle had obtained from her a promise to convey to him one of two lots of land left by her father, the uncle asserting that he had advanced the money to complete the purchase of both lots. After her marriage the niece, feeling herself bound by the promise so given to her uncle, conveyed the lot selected by him, which was much more valuable than the other. The money (if any) paid was much less than the value of the lot conveyed. The conveyance was set aside, as having been obtained by undue influence, although six years had elapsed between the execution of the deed and the institution of the suit impeaching the transaction. *McGonigal v. Storey*, 14 Grant, 94.

A person given to drinking made a deed to his wife, understanding what he was doing, but without professional advice. A bill by his heir impeaching the deed was dismissed. *Corrigan v. Corrigan*, 15 Grant, 341.

UNSOUND MIND.

Where a bill was filed in the name of a person of unsound mind, not so found by inquisition, by a next friend, the Court, on the submission of the defendant, made a decree declaring

that the plaintiff was entitled to certain lands of which the defendant had the legal estate, subject to the defendant's lien for taxes, &c., which he had paid thereon; and the defendant not asking a sale, and it not appearing that a sale or other direction following the declaration was necessary in the interest of the plaintiff, the Court made no order founded on such declaration; and it not appearing that the suit was necessary, or that the defendant was guilty of any blameable conduct, he was held entitled to costs, and the next friend was ordered to pay them, without prejudice to any question as between him and the plaintiff's estate. *Young v. Heron*, 14 Grant, 580.

USURY.

See BUILDING SOCIETY.

Since the Statute of 16 Vic., cap. 80, and before the abolition of the usury laws, a mortgage at 10 per cent. cannot be enforced for more than 6 per cent., though as to payments made without appropriation, the mortgagee can appropriate the money to the satisfaction of the usurious interest before coming into court. In part payment of the usurious mortgage another mortgage of a third party was assigned, which had not fallen due: *Held*, that the amount of this mortgage could not be applied by anticipation to the payment of usurious interest not due. *Fuller v. Parnall*, 8 U. C. L. J. 86, 4 Cham. R., 86.

An assignment to the Trust and Loan Company of a valid existing mortgage bearing more than 8 per cent. interest is not necessarily void. *The Trust and Loan Company of Canada v. Boulton*, 18 Grant, 234.

The Court will not at the hearing of a cause allow an amendment or supplementary answer to let in evidence necessary for a defence of usury. *Ib.*

Where a bill was filed against an executor and trustee for the administration of an estate, and praying a receiver, on the ground of the executor becoming embarrassed, and having lately sold a valuable farm belonging to the estate to his own son at

an undervalue, without advertising the same, or communicating with the *cestuis que trust* under the will, and of his having taken a mortgage for the payment of the purchase money, in his own name individually and not as trustee; and the circumstances were such as to justify alarm on the part of the *cestuis que trust*; the executor was charged with so much of the costs of the suit up to the hearing as was occasioned by the suit being for a receiver. *Ib.*

VENDOR AND PURCHASER.

See SPECIFIC PERFORMANCE, MORTGAGE, I. 8.

I. RIGHTS AND LIABILITIES OF PURCHASER.

1. *Right of purchase—Order for possession.*
2. *Compensation—Lapse of time.*
3. *Agency—Repayment of profits.*
4. *Acceptance of title.*
5. (a) *Right to abstract.*
(b) *Orders 390, 391, 392, 393.*
6. *Claim to have good title shewn.*
7. (a) *Purchase for value without notice—Professional adviser—Notice—Registered title.*
(b) *Cloud on title.*
8. *Covenant against encumbrances—Right of Retainer.*
9. *Damages.*
10. *Vendor neglecting to disencumber.*
11. *Paying purchase money into Court.*

II. RIGHTS OF VENDOR, AND THEREIN OF VENDOR'S LIEN.

1. *Insolvency Sale by Sheriff.*
2. *When notes taken.*
3. *Where bond given.*
4. *Absence of agreement for lien.*
5. *Personal order for deficiency.*
6. *Vendor entitled to decree for sale.*
7. *Purchase by Railway Company.*
8. *Vendor mortgaging after contract.*

III. MISCELLANEOUS CASES AFFECTING THE RIGHTS OF VENDOR AND PURCHASER AND INCIDENT THERETO.

1. *Inadequacy of consideration—Misrepresentation.*
2. *Writing not naming price.*
3. *Lunacy.*
4. *Title deed—Crown bonds—Devise of trust estate, &c.*
5. *Estate tail—Statute of limitations—Infancy—Fraud—Conditional notice.*
6. *Who should prepare conveyance.*
7. *Delay—Occupation rent.*
8. *Interest on purchase money.*

I. RIGHTS AND LIABILITIES OF PURCHASER.

1. *Right of purchase—Order for possession.*
2. *Compensation—Lapse of time.*
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10. *Vendor neglecting to disencumber.*
11. *Paying purchase money into Court.*

I. (1) *Right of purchase—Order for possession.*

The defendant, who was entitled to purchase certain land, had been guilty of default in paying the purchase money ; had failed to erect a new saw mill on the land, as stipulated for ; had allowed the saw mills already thereon to fall into disrepair ; and had been cutting and removing the timber,—so that the saw mills were in such a condition that they would become utterly lost to the plaintiffs if the defendant was allowed to retain possession ; and that the saw mills and timber constituted the almost entire value of the mortgage security : *Held*, that the plaintiffs

were entitled to an order for possession in case the defendant did not pay the overdue instalments in a month, without prejudice to the plaintiffs' right to enforce the agreement for sale. *Philips v. Preston*, 14 Grant, 67.

I. (2) *Compensation—Lapse of time.*

Where a purchaser died after paying three-fourths of the purchase money, leaving an infant heir, who was entitled to a specific performance of the contract, and the vendor, at the instance of the administratrix, conveyed the property, which had greatly increased in value, to a third person, and it afterwards passed into the hands of persons without notice: *Held*, that the heir could sue the vendor in equity for compensation.

There was a lapse of 14 years after the vendor's conveyance before the bill for compensation was filed, the heir having been a minor all this time: *Held*, that the vendor having caused this delay by his own arrangement with the infant's relations which deprived the infant of their protection, this lapse of time was no bar to the suit.

With a view to fixing the amount of compensation inquiry was directed as to the condition of the estate left by the deceased purchaser, and whether the plaintiff or the estate received the benefit of any part of the purchase money on the subsequent sale of the property. *Forsyth v. Johnson*, 14 Grant, 639.

I. (3) *Agency—Repayment of profits.*

A person agreed with the owners of oil lands for the purchase of certain lots at stipulated prices, and was to have a certain time to accept. The purpose was to form a company to buy at an advance. To facilitate this the real prices were to be concealed; one of the vendors was to write a letter purporting to offer the whole at an advanced price which he named; the interest of the other, whose judgment in such matters parties would be likely to rely on, was not to appear, and he was to write a letter recommending the transaction. The project was successful; the property was bought, conveyed, and paid for. The shareholders before completing the transaction had notice that something was wrong, but they carried out the purchase notwithstanding, and did not object to the transaction until after oil

lands had greatly fallen in the market. The Court of Appeal (reversing the order of the Court below in this respect—see Grant, 16, 147) *Held*, that it was too late to rescind the purchase; but, that the company was entitled to a decree for payment of the agent's profit, first against the agent himself, and in default of his paying, then against the other parties. [SPRAGGE, C., and MOWAT, V.-C., dissenting.] *Lindsay Petroleum Oil Company v. Hurd*, 17 Grant, 115.

I. (4) *Acceptance of title.*

An abstract of title and the title deeds having been sent to a purchaser in November, 1869, at his own request, for the purposes of examination and advice, he retained the same for a considerable time, intimated no objection to the title, and in correspondence with the vendor's solicitors implied that he was content with the title, but in June, 1870, he claimed the right of investigating it afresh: *Held*, that by the lapse of time and the letters which he had written, he had impliedly accepted the title. *Rae v. Geddes*, 18 Grant, 217.

Notwithstanding that a decree declares that the defendant "has accepted the title of the plaintiff," the defendant has a right to object to a conveyance by the plaintiff alone if it appears that the legal estate is partly out of him. *Rae v. Geddes*, 3 Cham. R., 404.

I. (5) [a] *Right to abstract.*

Before an abstract was asked for, the purchaser had sold small portions of the land, and he and his vendees had cut down some of the wood thereon; but the vendor, notwithstanding, promised afterwards to give an abstract as demanded, and delivered an abstract accordingly: *Held*, that the plaintiff was entitled to have this abstract verified. *Gordon v. Harnden*, 18 Grant, 231.

I. (5) [b] *Orders* 390, 391, 392, 393.

On receiving an abstract of title the purchaser has seven days within which to object to the completeness of the abstract, and after any question of its completeness is disposed of, and the abstract made perfect in the sense of being complete, seven days

to object to the title; if, however, he takes his objection to the title in the first instance, the Master will not go into the question of the perfectness of the abstract, but will confine the purchaser to the objections he has made to the title.

No objections other than those specifically taken will be entertained by the Master.

The endorsed receipts for consideration money should appear in a perfect abstract, at all events as to deeds executed before the late Registry Act. *McMunus v. Little*, 3 Cham. R., 263.

I. (6) *Claim to good title.*

A agreed to sell to B "all his right, title, and interest" in certain specified property "owned by" A, and to "give a good and sufficient deed of the said land, free from all incumbrances:" *Held*, that the vendor was bound to shew a good title. *Gordon v. Harnden*, 18 Grant, 231.

A vendor does not shew a good title by producing and furnishing to the purchaser an abstract shewing on the face of it a good title; he does so only when he verifies such abstract.—*Grainger v. Latham*, 14 Grant, 209.

I. (7) [a] *Purchaser for value without notice—Professional adviser—Notice—Registered title.*

A testator, the registered owner of the property in question, gave an annuity to his wife, and charged it on his real estate. His heirs, being also his devisees, did not register the will, and made a partition of the property as heirs. One of the heirs who was an attorney, sold part of his share to P, the latter employing no other attorney in the transaction; P's interest afterwards passed to the defendant M. The widow filed her bill to enforce her annuity against this property, and M set up that P was a purchaser for value without notice: *Held*, that P's vendor was not his attorney, so that his knowledge of the charge could not be imputed to P; and the Court not being satisfied with the evidence of express notice, dismissed the bill with costs. *Rykert v. Miller*, 14 Grant, 25.

It is a clear and well settled rule of this Court that equity will never deprive a purchaser for value without notice of any advantage he has arising from either a legal or equitable title, or even from mere possession, although as between or amongst mere equitable claimants it will enforce the rights of the prior against the subsequent claimants in point of time. *Mitchell v. Gorrie*, 6 Grant, 625.

A held a bond for the conveyance of property and assigned it absolutely to *B*, but for the purpose of security only, *B* sold the property to *C*, and *C* sold to others. *C* before his purchase had no notice that the bond to *B* was a security merely. *A* having become bankrupt his assignees applied to redeem and was held entitled in the absence of any evidence that *C* was a purchaser for value; but the Court directed the cause to stand over, with liberty to *C* to give such evidence upon payment of costs, unless the plaintiff should desire also to give evidence, in which case the cause was to stand over without costs. *Cherry v. Morton*, 8 Grant, 402.

I. (7) [*b*] *Cloud on title*.

As against a purchaser for value a voluntary deed, though registered, is void; and as this objection will avail the purchaser in any proceeding adopted either by or against him, this Court will not interfere to remove the registration of the void deed as a cloud on the title. *Buchanan v. Campbell*, 14 Grant, 163.

I. (8) *Covenant against incumbrancers—Right of retainer*.

On the sale of land, which was subject to a prior mortgage which the vendor had given, and which was not then due, the vendor executed a covenant to the purchaser *B*, covenanting that he had not incumbered the property, and the purchaser *B* executed a mortgage for his unpaid purchase money. The intention was, that the vendor should pay the prior mortgage, but he failed to do so; after it became due he sold and assigned *B*'s mortgage to the plaintiff, who had notice of all the facts; the plaintiff afterwards obtained an assignment of the prior

mortgage, and *B* paid off the same: *Held*, that *B* was entitled to apply on his mortgage the money so paid by him to the plaintiff. [STRONG, V.-C., dissenting.] *Henderson v. Brown*, 18 Grant, 79.

I. (9) *Damages.*

On a sale of land the purchaser gave his note for the balance of purchase money, and received a conveyance containing the usual covenants. There was a mortgage on the property at the time for a sum less than the amount of the note, and the purchaser claimed to set off against the note damages he had sustained by being unable to re-sell the land in consequence of the mortgage: *Held*, not allowable. *Stevenson v. Hodder*, 15 Grant, 570.

Where a person falsely representing himself to be the agent for the owner of certain land, entered into a contract for the sale thereof, and received a deposit on account of the purchase money, but the vendee could not get a specific performance of the contract: *Held*, that his remedy against the agent for the return of the deposit was at law, and that a bill for that purpose would not lie. *Graham v. Powell*, 15 Grant, 327.

I. (10) *Vendor neglecting to disencumber.*

W entered into a contract for the purchase of property, the price being payable by instalments; and, there being a mortgage on the property which was not due, the vendor was to give the vendee a bond of indemnity in respect of the mortgage. A decree was afterwards made at the suit of the vendor for specific performance, on his undertaking, recited in the decree, to procure a release of the mortgage; the overdue instalments were ordered to be paid into the Bank, subject to the further order of the Court. Part only was so paid, and, in consequence of the default as to the residue, the mortgage was not paid when due, and was foreclosed in a suit to which both the vendor and vendee were defendants. The purchaser then applied by petition to stay all proceedings in the specific performance suit, which (the plaintiff not objecting) was granted,

and the money in Court was ordered to be paid to the vendor, in consideration of the loss he had sustained through the purchaser's default. *Robson v. Wride*, 15 Grant, 111.

I. (11) *Paying purchase money into Court.*

Where there was a controversy as to whether a purchaser bought subject to or free from a mortgage which was on the property, and there was no suggestion of danger in respect of the purchase money, the Court in a very special case refused to order payment of the amount into Court pending proceedings, though a conveyance had been executed and the purchaser had gone into possession. *Mulholland v. Hamilton*, 15 Graht, 53.

II. RIGHTS OF VENDOR, AND THEREIN OF VENDOR'S LIEN.

1. *Insolvency—Sale by Sheriff.*
2. *Where notes taken.*
3. *Where bond given.*
4. *Absence of agreement for lien.*
5. *Personal order for deficiency.*
6. *Vendor entitled to decree for sale.*
7. *Purchase by Railway Company.*
8. *Vendor mortgaging after contract.*

II. (1) *Insolvency—Sale by Sheriff.*

Land subject to a vendor's lien for unpaid purchase money, was sold under execution at Sheriff's sale to a purchaser without notice. The execution debtor subsequently re-purchased the land from the Sheriff's vendee in the name of a third party, who conveyed to a brother of the debtor, in trust for the latter, who having become insolvent, made an assignment under the Insolvency Act of 1864: *Held*, that the vendor's lien attached on the lands in the hand of the assignee; but,

Semble, that the Sheriff's vendee would have held free from the lien; though, if the execution creditor had himself become the purchaser at Sheriff's sale he could have so held the land, free from such lien, though ignorant of the latter: *Quære*. *VanWagner v. Findlay*, 14 Grant, 53.

II. (2) *Where notes taken.*

On the sale of land notes were taken by the vendor for a portion of the purchase money: *Held*, that the vendor retained his lien for the amount unpaid, although, in fact, the vendor did not intend to retain any lien; and one witness in the cause swore that "the notes were taken in payment of the land," it appearing there was no agreement or arrangement that there should be no lien. *Rachel McDonald v. Archibald McDonald*, 16 Grant, 678.

II. (3) *Where bond given.*

The principle that a vendor, by taking from a purchaser an endorsed note as security for unpaid purchase money does not thereby lose his vendor's lien, is equally applicable where the security given is a bond, in which a third person joins as surety. *Shennan v. Parsill*, 18 Grant, 8.

II. (4) *Absence of agreement for lien.*

One of two partners, on retiring from the partnership, conveyed to the remaining partner all his interest in the partnership lands, mill, and stock-in-trade, who gave the retiring partner his promissory note for £500, payable on the 1st September, 1867, agreeing at the same time that, in case of his effecting a sale of the premises before that time, to pay the note though not due. There was no evidence of any express agreement for lien on the property assigned: *Held*, that the circumstances were such as to negative the retention of any vendor's lien by the retiring partner. *Mathers v. Short*, 14 Grant, 254.

II. (5) *Personal order for deficiency.*

In case of a decree for unpaid consideration money, the sale of the property should be provided for, and in case the same does not realize sufficient to pay the money with six years' arrears of interest, there should be a personal decree for payment of the balance by the purchaser. *Skelly v. Skelly*, 18 Grant, 495.

II. (6) *Vendor entitled to decree for sale.*

A vendor who has conveyed without receiving the purchase-money, is entitled against the vendee to a decree for a sale of the property and payment of any deficiency. *Sanderson v. Burdett*, 16 Grant, 119.

II. (7) *Purchase by railway company.*

It is clearly settled that the rights and franchises of a railway company do not prevail over a vendor's lien; and where land was sold to a railway company for the purposes of the road, and a mortgage taken to secure the unpaid purchase-money: *Held*, that the vendor's lien was not thereby lost. *Galt v. Erie and Niagara Railway Company*, 15 Grant, 637.

II. (8) *Vendor mortgaging after contract.*

A party, after making a contract for the sale of land, mortgaged it, and then filed a bill for specific performance. The mortgage not being due, the Court, on the hearing, directed an inquiry whether the plaintiff could make a good title free from incumbrance, and reserved further directions and costs, in case the Master should find he could not. *McDougal v. Miller*, 15 Grant, 505.

III. MISCELLANEOUS CASES AFFECTING THE RIGHTS OF VENDORS AND PURCHASERS, AND INCIDENT THERETO.

1. *Inadequacy of consideration—Misrepresentation.*
2. *Writing, not naming price.*
3. *Lunacy.*
4. *Title Deeds—Crown Bonds—Devise of trust estate, &c.*
5. *Estates tail—Statute of Limitations—Infancy—Fraud—Constructive notice.*
6. *Who should prepare conveyance.*
7. *Delay—Occupation rent.*
8. *Interest on purchase money.*
9. *Sale to a municipal corporation.*

III. (1) *Inadequacy of consideration—Misrepresentation.*

A and B had each a lot of wild land, and they negotiated

for an exchange. *A* claimed that his lot was worth \$900 ; *B* that his lot was worth \$800 ; they ultimately agreed to exchange, *B* to pay \$100 in money. Neither had any knowledge of the other's lot ; but the truth was that *A*'s lot was worth \$400 only : *Held*, that the doctrine *caveat emptor* applied, and that *A* was entitled to enforce the contract. *McRae v. Froom*, 17 Grant, 357.

III. (2) *Writing, not naming price.*

Where a writing provided for the conveyance of land on payment of the balance of the principal, not naming any amount, under a penalty of \$100, and there had been no part performance : *Held*, that the writing was insufficient for not naming the price, and that it could not be made binding on the vendor, by the subsequent consent of the vendee's heirs to treat the penalty as the price. *Kelly v. Sweeten*, 17 Grant, 372.

III. (3) *Lunacy.*

A vendor was insane, but not on all subjects ; and apart from his delusions a stranger might not perceive his insanity. In the course of the negotiation for a sale of land, he said to the purchaser that he was bewitched, which, it was shown, was one of his delusions : *Held*, that this statement was not sufficient indication of insanity to affect the vendee with notice of the vendor's condition. *McDonald v. McDonald* [In Appeal], 16 Grant, 37.

III. (4) *Title deeds—Crown bonds—Devise of trust estate, &c.*

A vendor is bound, at his own expense, to furnish a purchaser with copies of all instruments relating to the title which are not of record.

A purchaser is entitled to copies of title deeds registered by memorials, but not of deeds registered under the Registry Act of 1867.

Where a testator held certain lands as a trustee, to secure a debt due him, and devised the residue of his property to his executors, except such parts thereof as might at his decease be

vested in him upon any trusts or by way of mortgage, and then, by a subsequent devise, all the residue of his estate, real and personal, to *J. M.* (whom he also appointed one of his executors), and his heirs absolutely: *Held*, that under the second devise the legal estate in the property held in trust passed to *J. M.*: *Held*, also, that *J. M.* and the executors could by their deed pass all the legal and equitable interest in the trust estate sold.

The testator, under the above circumstances, had joined in certain Crown bonds, which remained undischarged: *Held*, that they formed a charge upon the lands, which the purchaser was entitled to have removed. *Re Charles*, 4 Cham. R., 19.

III. (5) *Estate tail* — *Statute of Limitations* — *Infancy* — *Fraud* — *Constructive notice*.

Before the passing of the Act respecting the assurance of estates tail, a tenant in tail executed a deed purporting to convey the property in fee, and gave up possession to the purchaser: *Held*, that the Statute of Limitations did not begin to run until the death of the grantor.

A tenant in tail, who was supposed to have the fee simple, sold the property a few weeks before the passing of the Act respecting Assurances of Estates Tail; the purchaser accepted the conveyance and paid the purchase money without seeing the will or having the title investigated; the eldest son of the vendor was not quite twenty-one at the time; he was aware of his interest, but was anxious that the sale should be effected, urged the purchaser to buy, and was privy to the completion of the purchase, without giving any notice of his title, or of the defect in the father's right to convey; the purchaser went into possession, and improved the premises, and had no notice of the defect in his title until after the death of the vendor: *Held*, that he was entitled to hold the property in equity against the issue in tail.

In such a case, constructive notice of the defect in the vendor's title is no bar to the purchaser's right to relief. *Re Shaver*, 3 Cham. R., 379.

III. (6) *Who should prepare conveyance.*

Who should prepare conveyance. *Watts v. Parker*, 2 Cham. R., 33.

III. (7) *Delay—Occupation rent.*

Where there had been considerable delay in completing the title to property, and the purchaser paid the purchase money into Court without prejudice, it was held improper in charging the vendors with the rents during the interval, to direct the Master in fixing the amounts to have regard to what the purchaser might have rented the premises for, or to charge the vendors with an occupation rent, without evidence of such occupation, or with deterioration and damage to the property, except such as occurred through the act or default of the vendors. *Dudley v. Berczy*, 2 Cham. R., 364.

III. (8) *Interest on purchase money.*

On a purchase of land the vendee gave his promissory note payable in a year with interest for part of the purchase money. The vendor died before the note became due, and administration was not taken out for eleven years. In a suit commenced a year afterwards by the administrator, it was held that, as the cause of action did not arise until there was some person to sue, interest was recoverable for the whole period from the date of the note. *Stevenson v. Hodder*, 15 Grant, 570.

• III. (9) *Sale to a municipal corporation.*

The name of the seller or his agent must appear in the contract of purchase by a municipal corporation.

Where a municipal corporation contracted for the purchase of some land for a market site, and afterwards a by-law was passed, with the sanction of the ratepayers, which revised the purchase, but did not name the seller, and there was no other evidence under the corporate seal, and possession had not been taken, it was held that the contract could not be enforced by the vendor against the corporation. *Houck v. Town of Whitby*, 14 Grant, 671.

VENUE.

See CHANGING VENUE.

VESTED INTEREST.

See WILL, VII.

VESTING ORDER.

See PURCHASER.

VOID BEQUEST.

See WILL, IV. 2—MORTMAIN.

VOID SALE.

See FATHER AND SON.

By sheriff.

In a suit setting aside a purchase made by a mortgagee at a sheriff's sale, and giving the parties interested in the equity of redemption liberty to redeem, the Court, while granting that relief, refused actively to enforce the sale by requiring the mortgagee to give credit for the purchase money in reduction of his debt. *McLaren v. Fraser*, 17 Grant, 533.

VOLUNTARY CONVEYANCES' ACT (1868).

The Voluntary Conveyances' Act (1868) gives effect as against subsequent purchasers, to prior voluntary conveyances executed in good faith, and to them only; and a voluntary conveyance to a wife for the purpose of protecting property from creditors was held not to be good against a subsequent mortgage to a creditor. *Richardson v. Armitage*, 18 Grant, 512.

WAREHOUSEMAN'S RECEIPTS.

A warehouseman sold 3,500 bushels of wheat, part of a larger quantity which he had in store, and gave the purchaser a warehouseman's receipt under the statute, acknowledging that he had received from him that quantity of wheat, to be delivered pursuant to his order to be endorsed on the receipt. The 3,500 bushels were never separated from the other wheat of the seller : *Held*, by the Court of Appeal [SPRAGGE, C., MORRISON, and GWYNNE, J.J., dissenting], that the purchaser had an insurable interest. *Box v. The Provincial Insurance Company*, 18 Grant, 280.

WAIVER.

See SECURITY FOR COSTS.

WARRANT.

Proceedings on. See SECURITY FOR COSTS.

WIDOW.

Devise to. See DEVISE, III.—Mortgage.

WASTE.

See INJUNCTION, II. 5.

Constructive Waste.

A person who has an interest in remainder, subject to an estate for life, cannot maintain a bill in respect of merely permissive waste, by whomsoever committed. Where the bill had not been proved, and a bill was filed for (amongst other things) an account against persons said to be in possession of the assets, the answer took the objection that a personal representa-

tive was a necessary party ; the suit failing, so far as it related to other objects, the Court at the hearing dismissed the bill with costs. *Zimmerman v. O'Reilly*, 14 Grant, 646.

WILL.

I. AFTER ACQUIRED ESTATE.

II. WIDOW, HER DOWER, RIGHT OF ELECTION, &c.

1. *Widow's share—Account.*
2. *Dower—Election—Statute of Limitations.*
3. *Provision in lieu of dower.*

III. MAINTENANCE.

1. *Maintenance charged on annual profits—Legacies charged on corpus.*
2. *Double Maintenance.*
3. *Where not forfeited.*
4. *Infants, Petition under 29 Vic., c. 28, s. 31.*

IV. MORTMAIN, STATUTE OF, &c.

1. *Extrinsic Evidence.*
2. *Void bequests, Parties.*

V. RESIDUE AND RESIDUARY ESTATE.

1. *Undisposed of residue.*
2. *Devise to executrix beneficially.*
3. *Residuary estate.*

VI. TRUSTS, TRUSTEE, AND CESTUI QUE TRUST.

1. *Marrying with approval of trustees.*
2. *Cestui que trust entitled to personal possession.*

VII. VESTED INTERESTS.

1. *Distribution, period of.*
2. *Where vested and not contingent.*

VIII. POWERS.

1. *Power of sale.*
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3. *Implied power to sell.*
4. *Whether naked power or trust.*

IX. ESTATES TAIL.

X. MISCELLANEOUS.

1. *"Dying without issue"—Personal trust.*
2. *Legacy held a charge on land.*
3. *Legacy to executors—Annuity payable out of corpus.*
4. *Time of payment of legacies—Interest—Charitable gift out of special fund.*
5. *Gifts to heirs and assigns of a living person.*
6. *Mixed fund.*
7. *Interest on legacy to minor children.*
8. *Will revoked by deed.*
9. *Imperfect enumeration.*
10. *Sheriff's sale.*
11. *Bequest upon conditions.*
12. *Compos mentis.*
13. *Mortgage after.*
14. *Precatory devise.*
15. *Proportionate bequest.*

I. AFTER ACQUIRED ESTATE.

A general devise of all the testator's real and personal property does not carry after-acquired real estate [MOWAT, V.-C., dissenting]. *Whateley v. Whateley*, 14 Grant, 430.

II. WIDOW—HER DOWER—RIGHT OF ELECTION.

1. *Widow's share—Account.*
2. *Dower—Election—Statute of Limitations.*
3. *Provision in lieu of dower.*

1. *Widow's share—Account.*

A testator directed his son to work his farm of 100 acres, worth £50 or £100 a-year, and pay one-third of the produce to his widow. The widow and son and an infirm daughter lived together on the place until the death of the son, all receiving

their support from the farm, the widow for part of the time doing work equivalent to the support she received, but making no demand for her one-third of the produce, and there being no agreement between them on the subject. A bill by the widow against her son's representatives for an account of her share of the produce, was dismissed with costs. *Gilmore v. Gilmore*, 14 Grant, 57.

II. (2) *Dower—Election—Statute of Limitations.*

Where the question as to whether the widow had elected to take an annuity in lieu of dower, arose in connection with a claim of the defendant for past maintenance and education of the plaintiff, and was a mere matter of inference, depending to a certain extent on the amount of moneys the widow had received—this point was reserved until after the Master had made his report.

The executor of an estate, which was small, permitted the widow of the testator to receive the moneys of the estate and expend them in the support of herself and children, and on the eldest son coming of age in 1852 the executor pointed out to him the clause in the will directing a distribution of the personal estate, but the only estate the executor then had was some household furniture. In 1867, the widow having set up a claim for dower, rejecting an annuity provided for her by the will, the heir-at-law filed a bill against the executor for an account: *Held*, that the Statute of Limitations did not bar the relief: but, inasmuch as the executor had had reason to believe he would never be called on for an account, the Court thought the Master, in proceeding under the decree, should act liberally upon the rule of Court giving the Master a discretion as to the mode of vouching accounts in his office. *Walmsley v. Bull*, 15 Grant, 210.

A testator devised his farm to a grandson, and directed the same to be rented during his minority, and that the testator's widow should be comfortably supported from the proceeds of the farm during life. The testator also directed his goods and chattels to be sold, and the proceeds placed at interest to sup-

port his widow and defray all necessary expenses. The widow after his death asserted a life interest in the property, and rented it: *Held*, that the widow had elected to take under the will, and that she was not entitled to any benefit in the personality other than the interest to accrue on the money produced by sale thereof; the *corpus* of the personality being distributed amongst the next of kin. *Montgomery v. Douglass*, 14 Grant, 268.

Where a testator by his will made provision for his widow, but did not express the same to be in lieu of dower, evidence for the purpose of shewing that the testator intended such provision to be in lieu of dower was held inadmissible.

Where a testator by his will, after making a provision for his widow, directing certain of his real estate to be sold at the expiration of a lease thereof then existing, and the proceeds to be divided among his three daughters, and that in the meantime the rent was to be divided among them: *Held*, that this latter expression was not inconsistent with the widow's claim to dower.

An intending purchaser of devised lands had some doubt whether a provision made by a testator for his widow was in lieu of dower, and asked the widow whether she had or claimed dower: *Held*, that if even her answer in the negative, it afforded no ground for the purchaser applying to this Court to restrain an action for dower brought by the widow on her being advised that, under the terms of the will, she was not put to her election. *Fairweather v. Archibald*, 15 Grant, 255.

II. (3) *Provision in lieu of dower.*

Quere, whether a provision for the maintenance of the testator's widow, charged on the real estate, is by implication in lieu of dower.

A testator devised his farm to his eldest son in tail, upon condition, amongst other things, that he should support the testator's widow during her life; that she should be mistress and have the control of the dwelling-house on the farm, and

should have the proceeds of one half the cows and sheep kept on the premises ; that the farm should be a home for the testator's son *John*, so long as it might be necessary for him to remain, and for another son, *Donald*, should any misfortune happen to him : *Held*, that the widow was not entitled to dower in addition to the provision made for her by the will *McLennan v. Grant*, 15 Grant, 65.

A testator, by his will, gave to his widow an annuity of \$4,000 in lieu of dower. His will contained certain devises, and gave other legacies and annuities which the testator charged on the whole of his estate not before devised, and he empowered his executors to sell any of his property which they should think necessary ; the widow elected to take the annuity : *Held*, that having so elected, she was not entitled to dower out of any of the testator's lands, whether devised or not : *Held*, also, that the legacies and annuities were payable primarily out of the personal estate. *Davidson v. Boomer* (In Appeal,) 18 Grant, 475.

A will contained the following bequest : "To *Richard O. Knight* I give my carpet, blankets, and whatever else I may have at his house." *Held*, that mortgages and a bank deposit receipt, which were in the house, did not pass. *Smith v. Knight*, 18 Grant, 492.

(See same point—*Collins v. Collins*, 24 L.T.N.S., 780.)

A testator bequeathed a sum of money to his wife in lieu of all dower, &c., and revoked "all gifts or deeds or deed of gift of any real estate made by me at any time heretofore." *Held*, that the widow was put to her election whether she would accept the bequest or retain an estate conveyed to her by a deed of gift during the lifetime of her husband. *Lee v. McKinly*, 18 Grant, 527.

A testator gave to his wife \$50 a year in lieu of dower, and directed that, if she should have a child to the testator, the annuity should be increased to \$100 so long as both lived, and as the annuitant remained the testator's widow. In a subsequent part of the will he directed that if such child

should live till fourteen he should be put to trade "and pay stopped when of age, shall \$100": *Held*, that the widow was entitled to the annuity of \$100 absolutely until the child was twenty-one, provided the child lived so long and the widow remained unmarried; and that in case the child should die before twenty-one, or in case the widow should marry, the amount was to be reduced to \$50 a year for the remainder of her life. *Bateman v. Bateman*, 17 Grant, 227.

III. MAINTENANCE.

1. *Maintenance charged on annual profits--Legacies charged on corpus.*
2. *Double maintenance.*
3. *Where not forfeited.*
4. *Infants—Petition under 29 Vic., c. 28, s. 31.*

III. *Legacies charged on corpus—Maintenance charged on annual profits.*

1. A testator devised a portion of his real estate to his widow and his eldest son *James*, jointly, and his heirs, "my wife *Jane* to have and to hold the aforesaid premises as long as she remains my widow, for my wife's *Jane Clark's* support and my small children's support, to be accepted by her in lieu of dower; and after her death my wife's part will belong to my son *James Clark*, aforesaid. * * * My son *James Clark*, aforesaid, will pay to my daughters [naming them] two hundred dollars each when they become the age of twenty-one years, that is, each as she becomes the age of twenty-one years." The testator then devised other real estate to his four younger sons, and proceeded to direct that his five sons should "remain on the old farm (the land devised to the widow and eldest son) and work together, and the proceeds of their work, except what is necessary for the maintenance of the family, that is for food and clothing, is to pay for the land already purchased * * * and if any of my sons aforesaid does not conform to this proviso * * * then the property I have given and devised to him or them shall be sold by my executors hereinafter named, and the proceeds of the sale

aforesaid shall be paid upon the land I have willed to those of my sons who fulfils this last provision:" *Held*, that *James* took an estate in fee in one moiety of the land devised to him and his mother; that the widow took an estate during widowhood in the other moiety, with remainder to *James* in fee, the whole being charged with the maintenance of the testator's widow and such of the children as continued to live on it; and with the payment of the purchase money payable on the lands devised to the sons who remained on and worked the farm; both charges being on the annual profits, not on the *corpus*; *James*, however, being entitled to insist that the lands devised to any of the sons who abandoned the farm should be sold and the produce applied in payment of lands devised to those who remained, and that any surplus of the produce not required for maintenance, and to pay off purchase moneys, was divisible between *James* and his mother in equal moieties: *Held*, also, that the legacies to the daughters were payable out of the *corpus* of the estate devised to *James*. *Clark v. Clark*, 17 Grant, 17.

III. (2) *Double maintenance.*

A testator (amongst other things) devised certain lands to each of his two younger children, and directed that the rents should be and remain to his widow or executors for the education and bringing up of the devisees respectively until they were twenty-one, &c.; and he also left all the dividends and profits of his bank stock, &c., to his widow and executors for the same purpose. The residue of his estate was to be divided equally amongst all his children. The rents of the lands devised to one of the younger children were alone more than sufficient for his education and maintenance: *Held*, notwithstanding, that he was entitled to a share of the dividends bequeathed; that, the whole income derived from the stocks being given, the gift could not, in favour of the residuary legatees, be construed as conditional on being needed for the purpose specified. *Denison v. Denison*, 17 Grant, 219. Affirmed on re-hearing, 18 Grant 41.

III. (3) *Where not forfeited.*

A testator, amongst others, made the following bequest, in favour of his housekeeper : " And further under the said *H P*, to have her own free will to stay on the premises, I now at this time enjoy and possess, and for her to have a quiet home and maintenance as long as she may think good to hold to the said privilege." *Held*, that *H P* had not forfeited her right to the provision by merely ceasing for a time to avail herself of the intended benefit. *Hesp v. Bell*, 16 Grant, 412.

III. (4) *Infants*—*Petition under 29 Vic., ch. 28, sec. 31.*

Where a testator bequeathed part of his residuary estate to two infant legatees, directing the interest to be applied to their support and education until twenty-one years of age, or such previous time as the trustees might see fit to pay over the same to the legatees ; and that in the case of the death of either, the whole should be paid to the survivor ; the will containing no gift over in case of the death of both, the Court *held* that the trustees and executors had a discretion to apply part of the principal to the support and education of the legatees.

In such a case, the executors and trustees presented a petition under the Statute 29 Victoria, ch. 28, sec. 31 ; and it appearing that the parents of the legatees had abandoned them ; that the legatees had no other means of support ; and that the interest on their share of the residuary estate was inadequate for their support, the Court made an order approving of the application of part of the principal to supply the deficiency. *In re McDougall*, 14 Grant, 609.

IV. MORTMAIN, STATUTE OF.

1. *Extrinsic evidence.*
2. *Void bequest—Parties.*

IV. (1) *Extrinsic evidence.*

In the interpretation of a will, extrinsic evidence of surrounding circumstances, to shew what a testator intended by his will, is admissible ; but declarations by the testator of what he intended by his will, will not be received for that purpose.

Where a testator bequeathed a sum of money for the erection of a parsonage, but did not refer to any land already in Mortmain whereon it was to be built, extrinsic evidence was given to shew that land for the site of a parsonage had already been given by a third person, and that the testator had on various occasions pointed it out as the site for a parsonage, and had avoided building a school-house upon it, lest doing so should interfere with its use for a parsonage:—such evidence was received to rebut the presumption that would otherwise arise from the generality of the bequest, that the money bequeathed was to be applied in the purchase of land for a site, as well as for the erection of the building. *Davidson v. Boomer*, 15 Grant, 218.

IV. (2) *Void bequest.—Parties.*

A testator after bequeathing an annuity to his wife proceeded: "I also give and bequeath to my said wife all my household furniture, goods, chattels, of what nature and kind-soever and wheresoever situate; to have and to hold to her my said wife, her heirs and assigns for ever," and in subsequent clauses devised certain real property to different persons and for different estates, and also bequeathed a number of annuities to different persons, charging them on his estate generally, and disposed of his residuary real and personal estate: *Held*, that the bequest to the wife, though large and comprehensive enough to pass the whole of the testator's personal estate, and though not inconsistent with the bequest to her of an annuity; yet the subsequent bequests restricted the application of the bequest to personalty *ejusdem generis* with the particular description of property bequeathed; and the residuary bequest of personalty having failed through uncertainty as to the objects of the testator's bounty: *Held*, that the wife was not entitled to it under the words of the bequest to her.

Where property is bequeathed to executors on trusts which are too uncertain for execution the executors are not beneficially entitled.

Where a sum of money was bequeathed for the erection of a

parsonage : *Held*, (1) that there was an implied authority to purchase land whereon to erect such parsonage ; and (2nd) that in the absence of anything to shew that no portion of the fund was to be applied in the purchase of the land, the bequest was void under the Statute of Mortmain. To a bill either to establish or impeach the legality of certain charitable bequests the Attorney-General may be made a party. *Davidson v. Boomer*, 15 Grant, 1.

V. RESIDUE AND RESIDUARY ESTATE.

1. *Undisposed of residue.*
2. *Devise to executrix beneficially.*
3. *Residuary estate.*

V (1) *Undisposed of residue.*

Where a will does not dispose of the whole personalty, the executors are trustees for the next of kin, unless the will expressly shews that the testator intended they should take the residue beneficially.

Where money, mortgages, and promissory notes, were bequeathed to a legatee for life, it was held, that she was not entitled to the possession and disposition of the same, but to the income only ; though of farming stock and implements given for life by the same clause she was to have the use in specie. *Thorpe v. Shillington*, 15 Grant, 85.

V. (2) *Devise to executrix beneficially.*

A testator's will contained the following direction as to the residue of his property : " I give, devise, and dispose thereof as follows, that is to say : My will is, that my wife, *S W*, shall have full power and control over all my freehold and personal property ; that she, my executrix, her assigns, for ever, may have unlimited power to deed, bargain, alienate, or transfer, for ever, all or any part of my said property ; and further, any deed, transfer or conveyance, made by my said executrix, for my said property, or any part thereof, shall be valid and sufficient to the purchaser and purchasers, his or their heirs and assigns, for ever," and nominated his wife sole executrix of his will.

Held, that the widow took the residue beneficially. *Lyon v. Blott*, 16 Grant, 368.

V. (3) *Residuary estate*.

The testator, after devising a parcel of land to each of his three sons, directed his executors to collect the debts due to him, and out of the money so collected to pay his debts, funeral and testamentary expenses and legacies; and he charged the deficiency on two of the parcels which he had devised; by a subsequent part of his will he gave his household furniture and other personal chattels to his wife for her own use, except the piano, which he gave to one of his daughters; there was no other residuary clause in the will: *Held*, that the whole of the testator's residuary estate, except the debts due to him and the piano, went to the wife, exonerated from the debts which the testator owed. *Scott v. Scott*, 18 Grant, 66.

The testator left two unsigned and undated scraps of paper, on one of which he had written, "I leave the whof of my property (on one line) to William Brown, Townhead, Arbuthnot, by Fordoun, Scotland, \$2000;" and on the second scrap of paper he had written, "I give Peter Crann \$500 for himself," which were admitted to probate as the last will of the deceased: *Held*, that there was an intestacy as to the residue of the personally over and above the \$2,500 mentioned in these bequests. In re *Nelson—McLennan v. Wishart*, 14 Grant, 199.

VI. TRUSTS, TRUSTEE, AND CESTUI QUE TRUST.

1. *Marrying with approval of trustees.*
2. *Cestui que trust entitled to personal possession.*

VI. (1) *Marrying with approval of trustees—Trusts contingent on.*

A testator devised his property in trust amongst other things to pay his son an annuity of £100, and in case of his marrying with the approbation of the trustees, then they were to hold certain specified property or to convey the same for the separate use of the wife during her life, subject, if the trustees thought best, to the payment of such annuity to the son, and after the death of the wife, then to the use of the children of the mar-

riage or their issue, with a proviso "that the trusts in favour of such wife and children shall not arise, nor shall the approbation of my said trustees of such marriage be presumed or proveable, unless my said trustees shall by deed declare the said trusts in favour of such wife and children." The son married, but no declaration of trust in accordance with the proviso was made: *Held*, that a declaration by deed was necessary to give the wife or children a *locus standi* in Court, and that evidence of conduct on the part of the trustees tending to show their approbation of the marriage, was insufficient. *Foster v. Patterson*, 15 Grant, 426.

VI. (2) *Cestui que trust entitled to personal possession.*

The rule is that where property is devised to a trustee in trust to pay the rents and profits to the *cestui que trust*, the *cestui que trust* is entitled to possession. This rule applies though there are charges on the property, proper terms being in that case imposed by the Court as the conditions of giving possession. But the Court will not give possession to the *cestui que trust* where it sees that doing so would do violence to the intention of the testator.

Where a will which was treated by the parties as devising the testator's farm to his executors, gave his widow all the rents, issues, and profits thereof, after deducting all necessary expenses thereout to be paid by his executors, * * * to his widow by half-yearly payments during the residue of her natural life, but devised the dwelling-house on the farm to herself directly, and not to the trustees; gave them power to lease and keep under lease the farm, with the exception of the dwelling-house; directed them to sell the stock, crops and farming implements; and to permit the widow to take firewood from the back part of the farm, for the use of the dwelling-house; it was *held*, that the widow was not entitled to the personal possession of the farm. *Whiteside v Miller*, 14 Grant, 393.

VII. VESTED INTEREST.

1. *Distribution, period of.*
2. *Where vested and not contingent.*

VII. (1) *Distribution, period of.*

A testator devised all his real estate to his two daughters and a grand-daughter "during their lives or the lives of any one of them, for their support; and in the case of the marriage of any of them, to those above-named remaining unmarried," and after their decease, the property was to be sold for the benefit of all his grandchildren. At the time of his death, all were living and unmarried; subsequently one of the daughters married, but became a widow; the other daughter died unmarried and intestate, and the grand-daughter afterwards married (in 1864): *Held*, (1) that the estate which became vested under the will in the grand-daughter, was not defeasible upon her marriage. (2) That the sale and distribution of the estate was not to take place until after the death of the grand-daughter; and (3) That the grand-children, the devisees, overtook vested interests, and that all grand-children born before the period of distribution were entitled, and took *per capita* and not *per stirpes*. *Wight v. Church*, 15 Grant, 413.

A testator devised all his real estate to his two daughters and a grand-daughter "during their lives or the lives of any one of them, for their support; and in the case of the marriage of any one of them, to those above-named remaining unmarried;" and after their decease, the property was to be sold for the benefit of all his grandchildren. At the time of his death, all were living and unmarried; subsequently one of the daughters married, but became a widow; then the other daughter died unmarried and intestate, and afterwards the grand-daughter married: *Held* [SPRAGGE, V.-C., dissenting], that on the marriage of the grand-daughter the property was to be sold and divided among the grandchildren. *Wight v. Church* [on re-hearing], 16 Grant, 192.

VII. (2) *Where vested and not contingent.*

A testator directed his real estate to be sold and the proceeds to be divided among his children; but the share of one of them (*James*) he directed to be placed at interest for his benefit, and the interest to be paid by the executors to *James* every six

months, and the testator directed that at the death of *James* his share should be equally divided between *A* and *S*, two of the testator's other children : *Held*, that the gift to *A* and *S* was vested, and not contingent, and that *A* having assigned his interest and died before *James*, the interest of *A* went to his assignee. *Martin v. Leys*, 15 Grant, 114.

VIII. POWERS.

1. *Power of sale.*
2. *Power of tenant for life to deal with corpus.*
3. *Implied powers to sell.*
4. *Whether naked power or trust.*

VIII. (1) *Power of sale.*

A testator by his will devised as follows : "Also it is my will, that when the aforesaid property be sold, that the interest be put to the clothing and schooling of my children, and to the support of my wife, so long as she remains my widow ;" and by a subsequent clause named certain persons executors of his will ; "and of the aforesaid estate and effects, and to apply the same according to the directions in the said will : " *Held*, that under these provisions the executors had full power to sell and convey the lands in fee, and that a child of the testator, born after the making of the will, was not a necessary party to the conveyance. *Glover v. Wilson*, 17 Grant, 111.

A will, after giving several pecuniary legacies, contained this direction : "When my lands are sold and all the legacies paid, the money remaining is to be divided" in the manner therein stated. There was no other residuary clause. The testator named two executors, adding, "In them I repose full confidence that they will act fair and consistent : " *Held*, that all the testator's lands were to be sold ; and that the executors had power to sell them, although they had not the legal estate. *Woodside v. Logan*, 15 Grant, 145.

VIII. (2) *Power of a tenant for life to dispose of corpus.*

A testator by his will (as construed by the Court) gave to his widow his real and personal estate for life, with power to dis-

pose of the personal estate at her own discretion during her life, and whatever of it remained at her death not so disposed of, went to a residuary legatee ; the testator also authorized his widow and co-executors to lay out such sums as might be deemed necessary for the carrying on his business as a distiller : *Held*, that the widow was not bound to convert the personalty into money ; that her estate was not liable for debts due the testator, which she had neglected to collect, and was not accountable for the testator's furniture, which was not forthcoming at her death ; nor for hay, grain, fuel, cart and horses, left by the testator and used by the widow in continuing the business. *McLaren v. Coombs*, 16 Grant, 602.

The widow improved the property : *Held*, that she was entitled to credit for so much only as was expended in completing work commenced by the testator. *Ib.*

VIII. (3) *Implied power of executors to sell.*

It is not settled whether, under a will that went into effect before the Act 29 Vic., c. 28, s. 15, a charge of debts on real estate by the will gave executors an implied power to sell.

Executors sold and conveyed lands under a supposed power in the will. This construction of the will being disputed, they filed a bill to confirm the purchaser's title, the defendants being the purchaser and one of the devisees ; but the Court *held* that the question could not be decided on a record so constituted *Grummet v. Grummet*, 14 Grant, 648.

VIII. (4) *Whether naked power or trust*

A will gave land to the testator's heir-at-law for life, with power to appoint the same to one or more of his sons ; and declared that the devisee (his heir) was not to alien or mortgage the lot ; and that it was not to be attachable by his creditors. *Quære*, whether this power was a naked power, or created a trust in favour of the devisee's son. *McMaster v. Morrison*, 14 Grant, 135.

IX. ESTATES TAIL.

The testatrix devised land to *A*, his heirs and assigns for ever, subject to certain legacies, and declared her will to be that, in case *A* died without leaving lawful heirs, his widow should enjoy the property during her widowhood; and that on her marrying again the land should be sold, and the proceeds equally divided among such of the sons and daughters of the testatrix or their heirs as were living: *Held*, that *A* took an estate tail, and by means of a disentailing deed could give a good title to the purchaser of the fee. *Dale v. McGuin*, 15 Grant, 101.

A testator devised certain property to his son *A*, and to the heirs of his body lawfully to be begotten, with power to appoint any one or more of such heirs to take the same: *Held*, that *A* took an estate tail; that there was no trust in favour of his children: and that mortgages therefore executed by him took precedence of the claims of the children under an appointment which he afterwards executed in their favour. *The Trust and Loan Company of Canada v. Fraser*, 18 Grant, 19.

X. MISCELLANEOUS, CHIEFLY ON THE QUESTION OF CONSTRUCTION.

1. *Dying without issue.*
2. *Legacy held a charge on land.*
3. *Legacy to executors—Annuity payable out of corpus.*
4. *Time of payment of legacies—Interest—Charitable gift out of special fund.*
5. *Gift to heirs and assigns of living persons.*
6. *Mixed fund.*
7. *Interest on legacies to minor children.*
8. *Will revoked by deed.*
9. *Imperfect enumeration.*
10. *Sheriff's deed.*
11. *Bequest upon conditions.*
12. *Compos mentis.*
13. *Mortgage after.*
14. *Precatory devise.*
15. *Proportionate bequest.*

X. (1) *Dying without issue—Personal trust.*

A testator devised certain real estate to his grand-daughter, and, in case of her dying without lawful issue, he directed the property to be sold by his executors; and from the proceeds of such sales, and from such other of his property as might be then remaining in their hands, he directed certain legacies to be paid, and the remainder to be applied at the discretion of his executors to missionary purposes: *Held*, that these provisions shewed a personal trust in the executors for the purposes specified, and that the contemplated "dying without issue" was a dying without issue living at the grand-daughter's death. *Re Chisholm*, 17 Grant, 403; affirmed on Appeal, 18 Grant, 467.

X. (2) *Legacy held a charge on land.*

A testator bequeathed to his wife maintenance or an annuity, at her option, to be furnished or paid by his sons *R* and *G*, and gave divers legacies, some of which he directed his executors to pay, and as to others, including the legacy to the plaintiff, he did not say how they should be paid: he then devised his farm to his sons *R* and *G*, subject to his wife's maintenance and subject to the maintenance of his younger children, and subject also to the legacies and bequests thereinbefore contained: *Held*, that the plaintiff's legacy was a charge on the farm. *Jones v. Jones*, 15 Grant, 40.

X. (3) *Legacy to executors—Annuity payable out of corpus.*

Where a testator gives a legacy to his executors expressly as a compensation for their trouble, and there is a deficiency of assets, such legacy does not in this country abate with the legacies which are mere bounties, even though the legacy somewhat exceeds what the executors would otherwise have been entitled to demand.

Where the testator directed his executors to invest in good securities such a sum as would pay an annuity thereby bequeathed, and the income of the fund was insufficient to pay the annuity: *Held*, that the annuitant was entitled to be paid

the deficiency out of the *corpus* or capital. *Anderson v. Dougall*, 15 Grant, 405.

X. (4) *Time of payment—Interest—Charitable gifts out of special fund.*

The testator devised his farm to *G*, and directed that if *G* should die without heirs, the land should be sold and legacy paid; and if the testator's widow should die or marry before *G* should have paid \$2,000, the balance should be equally divided amongst the testator's heirs. In a subsequent part of the will the testator directed that *G* should pay \$2,500 : *Held*, that the estate intended for *G* was the fee simple, with an executory devise over in case he should die without issue living at his death.

Held, also, that the word "heirs" in the bequest of the balance did not include the widow; and the same construction was put upon the word "heirs" in a residuary clause contained in the subsequent part of the will.—*Bateman v. Bateman*, 17 Grant, 227.

Where a testator directed his real and personal estate to be converted into money; the proceeds to be invested; such investments to be continued until the whole of his property should be realized; and from and out of the same, when so realized and invested in the whole, and thus available for division, and not before, to pay certain legacies : *Held*, (1) That until the whole was realized the legatees were not entitled to interest.

(2) That mortgages properly secured, which the testator held, should, for the purposes of the will, be deemed to be realized and invested immediately after the testator's decease.

(3) That the period of payment was not to be extended beyond the time that the estate might, with due diligence, be realized; and

(4) That the trustees could not prolong the period by selling the real estate on time. *Smith v. Seaton*, 17 Grant, 397.

The testator gave £3,000 to Trinity College, and £1,000 to Trinity Church, both to be paid out of certain gas stock. By

a codicil he reduced the latter bequest to £500, and gave to two other churches a further sum of £500 : *Held*, that this sum was to come out of the gas stock. *Ib*.

X. (5) *Gifts to heirs and assigns of a living person.*

A testator gave one-fifth of his residuary estate, real and personal, to the heirs and assigns of *A* and his wife, who were both living : *Held*, that *A* or his wife took no interest or power of appointment, but that their children living at the testator's death were entitled absolutely. *Levitt v. Wood*, 17 Grant, 414.

X. (6) *Mixed fund.*

Where debts and legacies are charged on real and personal estate, and there is no direction to sell the real estate, the personalty is the primary fund to pay, and the realty is liable only in case of a deficiency. *Davidson v. Boomer*, 17 Grant, 509.

X. (7) *Interest on legacies to minor children.*

A testator, after giving certain personal estate to his wife, and devising his lands to his two sons and his daughter (all minors), subject to a life-estate to his wife, directed the residue of his personal estate to be equally divided between his two sons on their attaining twenty-one ; and he further directed that if any of his children should die before attaining that age, then his or their share should be equally divided among the survivors ; and if all should die, he gave the whole on his wife's death to other relatives, whom he specified : *Held*, that the two sons were entitled to the interest on the residuary personal estate for their maintenance during minority. *Spark v. Perrin*, 17 Grant, 519.

X. (8) *Will revoked by deed.*

A testator devised 200 acres of his land to one of his sons, a minor, and the remainder (100 acres) to the testator's wife. The husband and wife afterwards agreed to live apart ; that her 100 acres should be given to her at once ; and that, in consideration of this, she should release her dower in the rest of his land. To effect this object both joined in a deed of the 300

acres to a trustee ; the trustee conveyed to the wife her 100 acres, and signed a declaration that he held the rest in trust, to convey the same to any person whom the grantor should appoint : *Held*, that the deed operated as a revocation of the will in equity as well as at law ;—the English Statute (1 Victoria, ch. 26, sec. 23) not having as yet been adopted in this country. *Lougheed v. Knott*, 15 Grant, 34.

X. (9) *Imperfect enumeration.*

A testator commenced his will by saying he disposed of the whole of his estate, and then gave \$2,000 to one person and \$500 to another person, his estate in fact being greatly in excess of those two amounts : *Held*, (affirming the decree of VAN-ROUGHNET, C.) that as to such excess there was an intestacy ; the rule as to cases of imperfect enumeration not applying to cases where a sum of money is named in the will. *McLennan v. Wishart*, in re *Nelson*, 14 Grant, 512.

X. (10) *Sheriff's sale.*

A testator charged several legacies on his real estate, which, subject thereto, he devised one-half to *R* and one-half to *G*, his sons. Executions against the testator's lands, in the hands of his executor, to the amount of \$131, and against the lands of the devisee *R* to a larger amount, were placed in the hands of the Sheriff, and the Sheriff put up the half devised to *R* under all these writs ; it brought \$1,378, and the Sheriff, after paying the small executions, applied the balance to the executions against *R* : *Held*, that it was wrong to sell under the executions against the executor more than enough to pay those executions ; that the effect of the Sheriff's course was to apply the property of the legatees to pay the debt to another person (*R*), and that the sale did not deprive the legatees of their charge ; but *R* having assented to the sale, the same was not disturbed so far as it affected his interest.

The Sheriff, at a subsequent sale under another small execution against the executors, put up the whole farm, and the same was knocked down to the purchaser of the half at the former

sale, at one-sixteenth of the value of the farm. Before conveyance one of the legatees filed his bill to restrain the carrying out of this sale, and it was held he was entitled to the relief prayed. *Jones v. Jones*, 15 Grant, 40.

X. (11) *Bequest upon conditions.*

A bequest was made to the son of the testatrix, payable on his attaining twenty-one, provided he continued a steady boy, and remained in some respectable family until that time, with a bequest over if he did not do so. Without any reason being assigned therefor, the legatee enlisted and served as a private soldier in the army of the United States during the time hostilities were carried on against the then Confederate States: *Held*, that the son by such conduct had not performed the conditions upon which alone he was to be paid the legacy given by his mother's will. *Pew v. Lefferty*, 16 Grant, 408.

X. (12) *Compos mentis.*

A will was executed by the testator on his death-bed: he was *compos mentis* at the time, but was so extremely weak in body and mind that his directions were given at intervals, and there was considerable difficulty in understanding them. No fraud, however, was pretended, and the Court was satisfied that the will was in accordance with the testator's wishes, and contained all that was understood of them, though probably not all the testator desired to express, and was understood by the testator at the time of executing it: *Held*, (affirming the decree of the Court below) that the will was valid. *Martin v. Martin* (In Appeal), 15 Grant, 586.

X. (13) *Mortgage after.*

Where a testator devised property and afterwards mortgaged it, and the personal estate was insufficient to pay the debts and legacies, it was *held per SPRAGGE, V.-C.*, that the devisee of the mortgaged property was entitled as against the legacies to have the property exonerated from the mortgage at the expense of the personal estate. *Lapp v. Lapp*, 16 Grant, 159.

X. (14) *Precatory devise.*

A testator, by his will, devised thus : " All the residue of my property, real and personal, I devise to my wife, requesting her to will the same to our children, as she shall think best." The widow devised the whole of the property to one child out of a number.

Held, that the words used were directory, not precatory only; that the power reposed in the widow was not properly exercised, as she was bound to divide the property among all the children, although she might, in her discretion, give personalty to one and realty to another. *Finlay v. Fellows*, 14 Grant, 66.

X. (15) *Proportionate bequest.*

The surplus was to be divided amongst the legatees in proportion to the other sums bequeathed to each. One legacy was of \$200, and an annuity ; and the legatee died within a year after the testator : *Held*, that her personal representative was entitled to a proportionate part of the annuity ; and that her share of the surplus was to be based on the \$200, plus this sum. *Woodside v. Logan*, 15 Grant, 145.

WITNESS.

See CONVEYANCE, II. 3.

A witness or a party is not obliged to attend and give evidence or submit to cross-examination, except he be duly notified or subpoenaed, even if he happens to be present when the proceedings are going on.

Where, therefore, a party to a suit who made an affidavit was present in the Master's office, and the solicitor for the opposite party proposed to cross-examine him on his affidavit, and he refused to answer, a motion *ex parte* to compel him to attend and be examined was refused. *Robins v. Curson*, 2 Cham. R., 343.

On an application made by the plaintiffs in an adminis-

tration suit for an order directing the personal representative to institute proceedings to impeach the validity of a judgment and execution, which had been recovered by a third party against a debtor to the estate, on the grounds of the same being fraudulent and collusive, the debtor was subpoenaed as a witness in support of the motion, and on his examination touching the *bona fides* of a judgment in question, he thus stated his objection: "I object to answer, on the ground that in this suit I cannot be examined in respect of matters arising in another suit in which I am a party; and also that I cannot be examined in this suit for the purpose of fishing out evidence upon which to found a suit against me, and to be used on an application in which fraud and collusion are charged against me."

Held, that this objection was not tenable, and the witness was ordered to attend again, at his own expense, and answer, and pay all costs occasioned to the plaintiff and the personal representative by his refusal.

Held, also, that to entitle the witness to privilege, on the ground that his answer would expose him to a "penalty or forfeiture," he must state explicitly that he believes his answer would have that effect, and not merely leave it to be inferred that his answer would have that effect. *Grainger v. Latham*, 2 Cham. R., 313.

WITNESS FEES.

A public officer who has charge of documents for which he is responsible, and attends as a witness in his public capacity, and in relation to matters connected with his office, will be allowed professional witness fees of \$4 per day. *Re Nelson*, 2 Cham. R., 252.

WRIT OF ARREST.

See ALIMONY.

ADDENDA AND CORRIGENDA.

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3. ADMINISTRATION.

Add, See Costs, 31. See also *Sinclair v. Dewar*, In Appeal, 19 Grant—reported whilst this volume in press.

18. ALIMONY—SUPPLY.

Interim Alimony runs from service of Bill. *Howe v. Howe*, 3 Cham. R., 494.

23. AMENDING. I. 7.

Add, See also *Kerr v. Finlayson*, 3 Cham. R., 497.

33. APPEALING. III. 6.

Add, See also *Heward v. Wolfenden*, 14 Grant, 188.

34. APPEALING. III. 7. End of Division, add, Leave to appeal from a report was refused where it appeared that the object of the appeal was to fix executors with interest upon a sum which they had invested, and upon which a loss was incurred. *Coates v. McGlashan*, 2 Cham. R., 218.

Parties cannot appeal against mistaken findings of the Master which are not of practical importance to them, though they may affect other parties *inter se*. *McCargar v. McKinnon*, 17 Grant, 525.

42. ATTACHMENT. III.

Reference should be made to *Re Beard*, 15 Grant, 441.

58. CORPORATION.

End of first case on page 8, should be 5.

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68. COSTS.

Add, Where a notice of hearing is irregular in form, and the opposite party does not take the objection until the cause is called on, he is not entitled to costs. *Stevenson v. Hodder*, 15 Grant, 542.

. DECISIONS, &c.

To case *Bolton v. Church*, add, 15 Grant, 450.

75. In case *Totten v. Douglass*, for "affirms," read "reverses."

75. Add to cases given *Sanderson v. Burdett*, which affirms 16 Grant, 110, Joint Purchase—Personal Decree.

76. To decisions reversed, add *Arnold v. Alliner*, 16 Grant, which reverses 15 Grant, 375, Equitable Plea. Add also *Totten v. Douglass*, 18 Grant, 341, which reverses 16 Grant, 243.

79. DECREE. VI.

Add, Reference to *Stephenson v. Nicholls*, 14 Grant, 144.

88. DEMURRER.

5. Costs. Insert at end of case, *Weiss v. Rankin*.

91. DISCOVERY.

Add, Reference to "Production of Documents," in Addenda.

107. EVIDENCE.

Add, Reference to "Trusts, &c."; and add end of subject, *Admission of new evidence*. The Court will not refuse to admit evidence recently discovered, even after a cause has been set down for hearing on a petition for review. *Small v. Eccles*, 2 Cham. R., 97.

115. EXECUTOR, Duties of, &c.

Add, *Where refused his costs*. Where an executor obtained the usual order for the administration of his testator's estate, and upon the hearing on further directions, no reason was shown for invoking the aid of the Court, and the guardian of the infants did not object in any way to the course taken by the exe-

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cutor, the Court refused both parties their costs.
Springer v. Clarke, 15 Grant, 664.

132. GARNISHEE.

Add, See Attachment—Judgment creditor.

139. INCOME.

Supply the heading, and read Income, *meaning of the term*, a charge on all the property and income of a company was held not to give a charge on debts, except so far as they represented income; and the term "income" was held to mean net earnings after providing for current expenses. *McCargar v. McKinnon*, 15 Grant, 361.

145. INJUNCTION.

Add reference to "Specific performance," "Specific chattels."

And add under same head, at end of *Cases in restraint of wrongful acts*, at page 153, the following case:—
 The plaintiff filed his bill to restrain certain of the defendants from closing windows which looked across a lane, of which plaintiff claimed to be owner, and on which the defendants were erecting a building. It appeared in evidence that the plaintiff had no title to the lane, but that the former owner of it had given him to understand that it would never be built upon. At the hearing, the plaintiff was allowed to amend his bill, by striking out the part claiming title to the lane; and a perpetual injunction was granted, restraining the defendants from closing the lane—the delay in filing the bill having been satisfactorily accounted for—with costs, less those occasioned by plaintiff's claiming title to the lane. *Biggar v. Allan*, 15 Grant, 358.

147. At foot of page, add to *Arnold v. Arnoldi*, "reversed on appeal. 16 Grant, 203. See "Equitable Plea."

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163. INTEREST.

Where a mortgage stipulated that up to a certain day the interest charged should be eight per cent., and if the principal were not then paid, twelve per cent. should thereafter be charged : *Held*, that the stipulation for payment of twelve per cent. was not by way of penalty, but an agreement to pay that rate from the day named. *Waddell v. McColl*, 14 Grant, 211.

165. INTERPLEADER.

End of subject add : Where a person in good faith, but from wrong information, replevied property which did not belong to him, and after a verdict against him, a new claimant insisted that the property was his, and threatened an action : *Held*, that the case was not one for an interpleader in this Court. *Ful-ler v. Paterson*, 16 Grant, 91.

179. MARRIED WOMEN'S ACT.

Add, See Executor, I. (1).

186. MORTGAGE, &c.

Under the division *Miscellaneous cases*, certain sub-headings are omitted, for which see the Division VII., page 202.

215. NOTICE.

Add, Reference to mortgage, I. 16.

218. ORDERS.

Add reference to General Orders.

221. PAROL EVIDENCE.

In reference for "Special," read "Specific."

222. PAROL TRUST.

The words in italics "*To establish a trust*," relate to prior heading, Parol evidence.

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223. PARTIES.

To a bill, add, To a bill either to establish or impeach the legality of certain charitable bequests, the Attorney-General may be made a party. *Davidson v. Boomer*, 15 Grant, 1.

To a bill for equitable dower, the tenant in actual possession of the premises may be a proper, though not necessary party. *McIntosh v. Wood*, 15 Grant, 92.

A municipal officer charged with some irregularities in the performance of his duties, but not guilty of any fraud or intentional wrong, is an improper party to a bill to set aside a tax sale on the ground of such irregularities. *Mills v. McKay*, 15 Grant, 192.

And refer also to *Rogers v. Wills*, 2 Cham. R., 13.

To a bill alleging that patentees obtained their patent by false representations to the Government, and shewed a case in which the patentees would not be entitled to compensation if the patent were set aside and the land given to another: it was held that the Attorney-General was not a necessary party. *Rees v. Attorney-General*, 16 Grant, 467.

Persons who acquired an interest in the subject of the suit before the suit was commenced, cannot be made parties by an order of revivor. *McKenzie v. McDonnell*, 15 Grant, 442.

234. PLEADING.

Add, reference to Demurrer, &c.—Answer, 7—Information—Parties.

To Division I., add: If an injunction may be granted to a defendant before the hearing (as to which *quere*), the answer should pray therefor specifically. *Brandon v. Elliott*, 14 Grant, 119.

To Division II., add: A bill which shews ground for

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repealing a patent is not demurrable for not shewing that the plaintiff was entitled to have a patent issued to him. *Rees v. Attorney-General*, 16 Grant, 467.

Add, also : Where a bill was not maintainable in respect of its principal object, and its statements were confused and verbose, the Court of Appeal declined to consider a minor relief to which the plaintiff claimed to be entitled, and allowed a demurrer to the bill, leaving the plaintiff to file a new bill for the latter relief, if he should be so advised. *Mutchmore v. Davis*, 14 Grant, 346.

End of subject generally, add : Pleadings should be in language and statement as brief and concise as possible, and neither matters of argument nor evidence should be introduced into them. In future, when pleadings are filed containing useless or improper statements, or admissions so restricted as to render proof necessary, the costs of such pleading will not be allowed to the party filing it ; but, on the contrary, he will be ordered to bear the costs occasioned thereby. *Kennedy v. Lawlor*, 14 Grant, 224.

244. PRACTICE.

Add to subject : Where proceedings are taken against an absent defendant by advertisement, a decree cannot be obtained on *præcipe*. *McMichael v. Thomas*, 14 Grant, 249.

261. PRODUCTION OF DOCUMENTS.

A mortgagee is not bound to produce his mortgage deed for the inspection of the mortgagor, when there is no question of title in dispute. *Bell v. Chamberlen*, 3 Cham. R., 429.

Under an order to produce taken out by one defendant, other defendants have no right to compel production or inspection. A motion for a further affidavit under

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such circumstances was refused with costs. *Seymour v. Longworth*, 2 Cham. R., 112.

264. PURCHASE, &c.

3. Add: A person purchased under a power of sale in a mortgage, but the sale was irregular, and was set aside: *Held*, that as a condition of relief against him, he should be allowed for all the improvements he had made under the belief that he was absolute owner, so far as these improvements enhanced the value of the property, but no further; and that he was not restricted to such improvements as a mortgagee in possession would have been entitled to make, knowing that he was a mortgagee. *Carroll v. Robertson*, 15 Grant, 173.

Without notice, &c., refer to International Law.

322. SALE.

Add, *Advertisement of*. Where a sale under a decree of the Court is put off, a note of such postponement at foot of the old advertisement will suffice without incurring the expense of a fresh advertisement. *Thompson v. Milliken*, 15 Grant, 197.